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No. ——

IN THE
Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Cross-Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Cross-Respondent

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when the EPA Administrator makes risk management decisions under § 109 of the Clean Air Act, 42 U.S.C. § 7409, she must ignore the broad economic, environmental, and indirect public health consequences of her decision to select a new NAAQS from a range of standards that reflect uncertain and indistinguishable health risks.

PARTIES TO THE PROCEEDINGS

1. CAA Industry Cross-Petitioners are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari: *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases), and *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1441 (and consolidated cases).

    American Forest & Paper Association
    American Iron & Steel Institute
    American Petroleum Institute
    American Public Power Association
    Appalachian Power Co., *et al.* is comprised of the following:
        Baltimore Gas and Electric Company
        Carolina Power & Light Company
        Central and South West Services, Inc.
            Central Power and Light Company
            Public Service Company of Oklahoma
            Southwestern Electric Power Company
            West Texas Utilities Company
        Central Illinois Public Service Company
        CINergy Corp.
        Columbus Southern Power Company
        Conectiv (petitioned as Delmarva Power & Light Co. and intervened as Atlantic City Electric Co. in the cases below)
        Consumers Energy Company
        Dayton Power and Light Company, The
        Detroit Edison Company, The

Duke Energy Co.
FirstEnergy (petitioned as Ohio Edison Co. and Centerior Energy Co., (with Centerior Energy Co. subsidiaries Cleveland Electric Illuminating Co. & Toledo Edison Co.) in the cases below)
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
LGE Energy Corp. (petitioned as Kentucky Utilities Company and Louisville Gas & Electric Co. in the cases below)
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company, dba Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
PacifiCorp
PPL Electric Utilities Corporation dba PPL Utilities (petitioned as Pennsylvania Power & Light Corp.)
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company, The

dba Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Tampa Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
dba Allegheny Power System, Inc.
Wisconsin Electric Power Company
and
Edison Electric Institute
National Rural Electric Cooperative Association
Chemical Manufacturers Association
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
Meridian Gold Company
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
(petitioned as National Petroleum Refiners Association in the case below)

National Stone Association
Nevada Mining Association
Newmont Gold Co.
Phoenix Cement Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

2. The following parties are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari, but have not joined CAA Industry cross-petitioners in filing this conditional cross-petition.

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Farm Bureau Federation
American Portland Cement Alliance
American Trucking Associations, Inc.
James Bassage
Burns Motor Freight, Inc.
Central Illinois Light Co.
Chamber of Commerce of the United States of America
Citizens for Balanced Transportation
Commonwealth Edison
Duquesne Light Co.
Equipment Manufacturers Institute
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory

Idaho Mining Association
Judy's Bakery, Inc.
David Matusow
Brian McCarthy
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Small Business United
Non-Ferrous Founders' Society
Oklahoma Gas & Electric
Richard Romero
Small Business Survival Association
State of Michigan
State of Ohio
State of West Virginia

3. Cross-Respondent United States Environmental Protection Agency was the respondent in all of the proceedings below.

4. The following parties were intervenors in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari.

American Lung Association
American Road and Transportation Builders Association
Atlantic City Electric Company
Commonwealth of Massachusetts
State of New Jersey

5. The following parties appeared as *amici curiae* in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari.

Representative Tom Bliley
Senator Orrin G. Hatch
State of Connecticut
State of New Hampshire
State of New York
State of Vermont

RULE 29.6 DISCLOSURE STATEMENT

1. The following list of CAA Industry Cross-Petitioners hereby discloses the parent companies of cross-petitioners and any publicly held companies that own 10% or more of Cross-Petitioners' stock.

Alabama Power Company
(a subsidiary of Southern Company)
Appalachian Power Company
(a subsidiary of American Electric Power Company, Inc.)
Baltimore Gas and Electric Company
(a subsidiary of Constellation Energy Group, Inc.)
Central and South West Services, Inc.
(a subsidiary of Central and South West Corporation)
Central Illinois Public Service Company
(a subsidiary of Ameren Corporation)
Central Power and Light Company
(a subsidiary of Central and Southwest Corporation)
Columbus Southern Power Company
(a subsidiary of American Electric Power Company, Inc.)
Consumers Energy
(a subsidiary of CMS Energy Corporation)
Dayton Power & Light Company, The
(a subsidiary of DPL Inc.)
Florida Power Corporation
(a subsidiary of Florida Progress Corporation)

Georgia Power Company
(a subsidiary of Southern Company)
Gulf Power Company
(a subsidiary of Southern Company)
Illinois Power
(a subsidiary of Illinova Inc.)
Indiana Michigan Power Company
(a subsidiary of American Electric Power Company, Inc.)
Indianapolis Power & Light Company
(a subsidiary of IPALCO Enterprises, Inc.)
Kentucky Power Company
(a subsidiary of American Electric Power Company, Inc.)
Mississippi Power Company
(a subsidiary of Southern Company)
Monongahela Power Company
(a subsidiary of Allegheny Energy, Inc.)
Northern Indiana Public Service Company
(a subsidiary of NiSource Inc.)
Ohio Power Company
(a subsidiary of American Electric Power Company, Inc.)
Potomac Edison Company, The
(a subsidiary of Allegheny Energy, Inc.)
Public Service Company of Oklahoma
(a subsidiary of Central and Southwest Corporation)
Savannah Electric & Power Company
(a subsidiary of Southern Company)

South Carolina Electric & Gas Company
(a subsidiary of SCANA Corporation)
Southwestern Electric Power Company
(a subsidiary of Central and Southwest Corporation)
Tampa Electric Company
(a subsidiary of TECO Energy, Inc.)
Union Electric Co.
(a subsidiary of Ameren Corp.)
Virginia Power
(a subsidiary of Dominion Resources, Inc.)
West Penn Power Company
(a subsidiary of Allegheny Energy, Inc.)
West Texas Utilities Company
(a subsidiary of Central and South West Corporation)
Wisconsin Electric Power Company
(a subsidiary of Wisconsin Energy Corporation)

2. The following CAA Industry Cross-Petitioners have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these Cross-Petitioners.

American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Carolina Power & Light Co.
CINergy Corp.
Chemical Manufacturers Association
Conectiv

Detroit Edison Co., The
Duke Energy Corp.
Edison Electric Institute
FirstEnergy Corp.
Jacksonville Electric Authority
Kansas City Power & Light Co.
Kennecott Energy and Coal Co.
Kennecott Holdings Corporation
Kennecott Services Company
LGE Energy Corp.
Madison Gas and Electric Co.
Meridian Gold Co.
Midwest Ozone Group
Minnesota Power
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (formerly National Petroleum Refiners Association)
National Rural Electric Cooperative Association
National Stone Association
Nevada Mining Association
Newmont Gold Co.
Oglethorpe Power Corp.
Ohio Valley Electric Corp.
Otter Tail Power Co.
PacifiCorp
PP&L Electric Utilities Corporation
dba PPL Utilities
Phoenix Cement Company

Plains Electric Generation & Transmission
Cooperative, Inc.
Potomac Electric Power Co.
Public Service Company of New Mexico
Salt River Project
Southern Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

CAA Industry Cross-Petitioners[1] conditionally cross-petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, No. 97-1440 (and consolidated cases), and *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, No. 97-1441 (and consolidated cases) (hereinafter "*American Trucking*"). CAA Industry Cross-Petitioners include trade associations representing most of the basic industries in this country, including the utility industry, coal industry, mining industry, oil industry, iron and steel industry, chemical industry, paper industry, paint and coating industry and home building industry; over 50 individual companies; and other organizations identified on the cover of this petition.

OPINIONS BELOW

The opinion of the court of appeals (EPA App. 1a-69a) is reported at 175 F.3d 1027. The opinions on the petitions for panel rehearing and suggestions for *en banc* rehearing (EPA App. 70a-101a) are reported at 195 F.3d 4.

JURISDICTION

The court of appeals entered its judgment on May 14, 1999. Petitions for panel rehearing were granted in part and denied in part, and suggestions for *en banc* rehearing were denied on October 29, 1999. The petitions for certiorari were docketed

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[1] Petitioners jointly filing this conditional cross-petition for a writ of certiorari are listed on the cover.

on January 27 and 28, 2000.[2] 28 U.S.C. § 1254(1) and Supreme Court Rule 12.5 provide the basis for jurisdiction for this conditional cross-petition, which is timely filed under Supreme Court Rule 12.5.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

In addition to the constitutional, statutory and regulatory provisions already set forth in the initial petitions for certiorari and accompanying appendices, additional provisions addressed in this Conditional Cross-Petition are listed below and either set forth below or in the Appendix.

1. Article I, Section 1 of the United States Constitution provides in pertinent part that "All legislative Powers herein granted shall be vested in a Congress of the United States...."

2. The Clean Air Act §§ 101(b), 108(b), 181-185B, and 307(b), 42 U.S.C. §§ 7401(b), 7408(b), 7511-7511f, and 7607(b) (App. 1a-64a); and the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 463, §§ 6101, 6102 (App. 65a-68a).

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[2] The original petitions for a writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit for these cases are Nos. 99-1257, 99-1263 and 99-1265.

STATEMENT OF THE CASE

Under our system of government, executive branch agencies may exercise only what power Congress has delegated to them. U.S. Const., art. I, § 1. In areas that are technically and scientifically complex, Congress often delegates authority in broad terms. In such cases, this Court has made clear that the *agency* must exercise its discretion to fill out the terms of the delegation, consistent with Congress' intent.

This petition seeks Supreme Court review of *judicially* imposed restrictions on the range of factors that the Environmental Protection Agency ("EPA") may legally consider in filling out the terms of a broad delegation of authority under the Clean Air Act ("CAA") to make risk management decisions in establishing or revising National Ambient Air Quality Standards ("NAAQS").

In § 109(b) of the CAA, EPA App. 111a, Congress directed EPA to set NAAQS at levels that are "requisite to protect" the "public health," allowing an "adequate margin of safety." Once NAAQS are set, EPA must review them periodically and revise them as "may be appropriate" in accordance with §§ 108 and 109(b). EPA App. 112a.

In recent rulemakings to revise the ozone and particulate matter ("PM") NAAQS, EPA refused to identify in the CAA any criterion for selecting among alternative pollutant levels that present uncertain and overlapping risks of adverse health effects.[3] For this reason the lower court remanded the revised

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[3] The background for EPA's decision is discussed at greater length in the CAA Industry Respondents' Brief in Response to the Petitions for Certiorari.

NAAQS to EPA, EPA App. 8a-11a, 18a, explaining that by failing to state a principle for defining how much risk is "too much" (i.e., how much is an "unacceptable" "public health" risk), the Agency had "construed §§ 108 and 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power." EPA App. 5a.

At the same time, the court below prohibited EPA on remand from considering the broad economic, environmental, and indirect public health consequences of its action, when it develops an "intelligible principle" to govern the exercise of its risk management judgment under § 109. According to the court, this prohibition flows from the plain language of the statute. EPA App. 19a.

CAA Industry Cross-Petitioners agree with the lower court that EPA interpreted § 109 in a way that raises nondelegation concerns, and they agree also that the Agency must articulate an "intelligible principle" to guide its exercise of discretion. Cross-Petitioners disagree, however, with the lower court's holding restricting the factors that EPA may consider in developing that intelligible principle. While we believe that the scope of EPA's authority to develop an intelligible principle is an issue fairly within the scope of the initial petitions for certiorari filed here, we request that if the Court grants any of the initial petitions, it also grant this Conditional Cross-Petition in order to focus its review specifically on this fundamental issue of national importance.

1. The NAAQS Program -- Congress provided in §§ 108 and 109 of the Clean Air Act for regulation of air pollution that "endangers" public health. Under § 109, EPA App. 111a, NAAQS are to be based on a "criteria document" that "accurately reflects the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on

public health or welfare expected from the presence of such pollutant in the ambient air in varying quantities." CAA § 108(a)(2), EPA App. 110a. "Simultaneously with the issuance of [the] criteria" document, EPA must also issue information on the "cost . . . and operation, energy requirements, emission reduction benefits, and environmental impact" of alternative methods for pollution control or prevention. CAA § 108(b), App. 1a-2a.

Under § 109, primary NAAQS must be set based on the criteria document, at a level that is "requisite to protect public health," and that allows an "adequate margin of safety." Once NAAQS are set, the Administrator must review them and the underlying criteria document every five years and revise them "as may be appropriate" in accordance with §§ 108 and 109(b). EPA App. 111a-112a. To help with this "appropriateness" determination, the Administrator must obtain the advice of her independent science advisers (the Clean Air Science Advisory Committee, or "CASAC") on additional knowledge required to determine the "adequacy" of existing standards and the "basis" for any revisions to them, and on "*any* adverse health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of revised NAAQS. CAA § 109(d)(2), EPA App. 112a, (emphasis added).

In enacting these provisions, Congress emphasized the importance of protecting "public health."[4] But it also made

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[4] *See Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1149 (D.C. Cir. 1980); *see also* S. Rep. No. 91-1196, at 10 (1970), *reprinted in* 1 Sen. Comm. on Env. and Pub. Works, *A Legislative History of The Clean Air Amendments of 1970* at 410 (Comm. Print, 1974) (hereafter referred to as "1970 Legis. Hist."); H.R. Rep. No. 95-294, at 49, (1977), *reprinted in* 4 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean*

clear that "public health" protection does not embrace a "no-risk philosophy" because that "ignores all social and economic consequences and is impractical."[5] Congress therefore intended the "margin of safety" standard of § 109 to reflect a "reasonable degree of protection" – not absolute protection – in the face of uncertain science.[6] As Senator Muskie, one of the architects of the Clean Air Act, explained during hearings on the 1977 amendments, Congress intended to set national standards only at levels necessary to protect against "unacceptable risks" and "to insure that public policy is wise policy, that we are protecting health and not overprotecting it, to the degree of inhibiting economic growth and the opportunities people need in order to enhance their lives."[7]

In short, §§ 108 and 109 were intended to advance, not to detract from, the congressional goal of achieving a balance that would "promote [both] the public health and welfare *and* the productive capacity of . . . [the Nation's] population." CAA § 101(b), App. 1a (emphasis added). The court of

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Air Act Amendments of 1977, at 2516 (Comm. Print, 1978) (hereafter referred to as "1977 Legis. Hist.") (stating that one of the purposes of the Act is "to emphasize the predominant value of protection to public health").

[5] H.R. Rep. No. 95-294, at 127 (1977), *reprinted in* 4 1977 Legis. Hist., at 2594; *cf.* 3 1977 Legis. Hist. at 1038 (statement of Sen. Muskie) (When there is "no threshold on health effects . . . it [is] very difficult then to apply absolute health protection.").

[6] S. Rep. No. 91-1196, at 10, *reprinted in* 1 1970 Legis. Hist., at 410.

[7] *Hearings on S. 251, S. 252 and S. 253 Before Subcomm. on Environmental Pollution of Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess., Part 3, at 6-7 (1977).

appeals' decision destroys that balance by forbidding consideration of the overall impacts on society of EPA's NAAQS decisions.

2. EPA's Rulemaking And The D.C. Circuit's Decision -- As NAAQS are revised to ever more stringent levels, the incremental health benefits of a revised standard become less certain, and harder to ascertain. At the same time, attaining more stringent standards becomes more difficult and expensive. The burdens on society that result from implementation of revised NAAQS therefore increase. Those burdens can include, for example, negative health effects caused by implementation of the NAAQS itself.

As standard-setting becomes more difficult, therefore, the costs to the public of mistakes -- including indirect public health effects and economic costs --become heavier. The only way to establish wise social policy in this situation is to consider all of the impacts of that decision on society.[8] These include not just the possible direct health benefits of a revised standard, but also other types of "risks" that might be increased or reduced as a result of standard revision. Only by considering all of the burdens and benefits to society of a decision to revise a NAAQS can the Agency conclude that the "public health" will be advanced by a change in the regulatory status quo.

The D.C. Circuit initially addressed the scope of EPA's authority to establish NAAQS under CAA §§ 108 and 109 in 1980, in *Lead Industries Ass'n, Inc. v. EPA ("Lead*

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[8] *See generally* Stephen Breyer, *Breaking the Vicious Circle* (1993); David Schoenbrod, "Remarks to the Board of Trustees of the Natural Resources Defense Council," 20 *Cardozo L. Rev.* 767 (1999).

Industries").[9] In this challenge to the original lead NAAQS, petitioners argued that EPA had improperly "refus[ed] to consider ... economic and technological feasibility" of pollution controls in establishing ambient standards for lead, a "threshold" pollutant.[10] EPA responded that it was not *required* to consider these factors, and Judge Wright agreed, explaining that Congress intended "to subordinate" economics and technical feasibility to the public health goals of § 109. *Id.* at 1149.

All the court was asked to decide in *Lead Industries* was whether EPA was *required* to consider cost and feasibility, and to the extent that the court's decision is limited to that holding it was not unreasonable: a *requirement* to consider costs could allow costs to override public health. Judge Wright went further, however, and observed broadly that "the statute and legislative history make clear that economic considerations *play no part* in the promulgation of air quality standards under section 109." *Id.* at 1148 (emphasis added). In subsequent years, the D.C. Circuit applied this broad *dictum* to bar consideration in setting NAAQS of the attainability of a revised NAAQS[11], and the indirect public health consequences of a NAAQS decision.[12]

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[9] 647 F.2d 1130, 1148 (D.C. Cir. 1980).

[10] *Id.* at 1148; *see id.* at 1138-41 (describing "threshold level[s]" for various effects). *Lead Industries* therefore did not present the more difficult risk management judgments called for by regulation of "nonthreshold" pollutants, for which EPA assumes some level of risk all the way to "zero" exposure; *see also infra* note 16.

[11] *American Petroleum Inst. v. EPA*, 665 F.2d 1176, 1185 (D.C. Cir. 1981).

[12] *NRDC v. EPA ("PM_{10}")*, 902 F.2d 962, 972-73 (D.C. Cir. 1990).

By contrast, the D.C. Circuit later took a very different approach to a parallel statutory provision commanding an even more precautionary approach to public health protection. In *NRDC v. EPA* (*"Vinyl Chloride"*), 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*), the court addressed language in § 112 of the Act requiring reduction in emissions of hazardous air pollutants to a level that protects public health with an "ample margin of safety" – a term that would appear to call for more restrictive public health policy judgment than the § 109 term "*adequate* margin of safety" (emphasis added).

Judge Bork, writing for the court, applied the approach specified in *Chevron U.S.A., Inc. v. NRDC*[13] (a case decided four years after *Lead Industries*), and found that the "margin of safety" language does not provide determinate criteria for standard setting. Rather, "the word 'safety' . . . is significant evidence that [Congress] did *not* intend to require the Administrator to prohibit all emissions of a non-threshold pollutant," because the term "'safe' does not mean 'risk-free.'" 824 F.2d at 1153 (emphasis added).

Furthermore, the court in *Vinyl Chloride* observed that while the requirement to provide an ample margin of safety to protect public health "evinces an intent to make health the primary consideration," it does "*not* . . . preclude

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[13] In 1984, in *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), the Court observed that review of an agency's interpretation of its enabling statute begins with evaluation of whether "Congress has directly spoken to the precise question at issue," and has expressed a clear intention as to its resolution. *Id.* at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue," the *agency* (not the reviewing court) must exercise its discretion to interpret the statute in light of the language, legislative history *and underlying policies of the statute*. *Id.* at 843.

consideration of any factor." *Id.* at 1155 (emphasis added). The court distinguished *Lead Industries* because that case had rejected only an argument that EPA "must" consider cost and technological feasibility. *Id.* at 1157-58. In *Vinyl Chloride*, on the other hand, the question was whether the Administrator *may* consider these factors. *Id.* (emphasis added). Thus, *Lead Industries* and earlier cases do *not* stand for the proposition that "cost and technological feasibility may *never* be considered under the Clean Air Act unless Congress expressly so provides." *Id.* at 1157 (emphasis added).

Nevertheless, the *Vinyl Chloride* court observed that the "*Lead Industries* court did note that the statute [i.e., § 109] on its face does not allow consideration of technological or economic feasibility." *Id.* at 1158-59. The court distinguished Judge Wright's broad conclusion regarding CAA § 109 from its analysis of the parallel language of CAA § 112 based on differences in the structural aspects of the ambient standards program (e.g., the role of States in determining specific implementation measures for ambient standards) and of the legislative history of § 109 (which *Lead Industries* suggested established a clear intent to preclude consideration of costs). *Id.* at 1159. The D.C. Circuit subsequently relied on the distinctions drawn by *Vinyl Chloride* in declining to apply the reasoning of this case when reviewing ambient standards.[14]

By 1990, therefore, the jurisprudence of the D.C. Circuit taught that, under the "adequate margin" language of § 109, cost and technological feasibility *need not* be considered and (according to the line of cases originating with the broad

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[14] *See NRDC v. EPA, ("PM10")*, 902 F.2d at 973.

dictum in *Lead Industries*) *could not* be considered. By contrast, cost and technological feasibility *could* be considered under the "ample margin" language in § 112(d)(4), according to the application of *Chevron* in *Vinyl Chloride*. With that judicial background for guidance, EPA launched the rulemakings to reassess the NAAQS for ozone and PM that culminated in the decision below.

In these rulemakings, EPA replaced the existing 1-hour ozone NAAQS with a more stringent 8-hour standard, and the existing particulate matter NAAQS based on a "PM_{10}" size indicator with "$PM_{2.5}$" standards for fine particles and "PM_{10}" standards for coarse particles.[15] For each of these "non-threshold" pollutants,[16] EPA was presented with a choice among alternative standard levels characterized by uncertain and indistinguishable health risks, a choice calling for the exercise of risk management judgment.

Regarding the revised ozone NAAQS, for example, CASAC concluded that the scientific record established "no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public

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[15] The court of appeals vacated the coarse particle standard as arbitrary and capricious, *see* EPA App. 57a-58a, because the PM_{10} indicator included a variable amount of fine particulate matter. EPA has sought no further review of this ruling.

[16] *See, e.g.*, Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237 ("[T]here is no threshold concentration for the onset of biological responses due to exposure to ozone above background concentrations."). *See also OAQPS Staff Paper*, PM JA 2068.

health."[17] With respect to the revised PM NAAQS, CASAC members could form no consensus regarding the level, averaging time or form of a revised standard because of many uncertainties regarding both the existence and nature of a causal relationship between public health and the $PM_{2.5}$ indicator.[18] The Administrator's choice among alternative standard levels therefore reflected "policy" judgment.[19]

If the record was not clear about what level is "safe," it was quite clear that EPA's choice of level would have profound impacts on society. For example, replacing the existing 1-hour ozone NAAQS, EPA explained, would require a new ozone reduction program based on the general planning requirements of Subpart 1 of the Act for certain areas of the country.[20] This would disrupt existing control programs and attainment planning that had been based on the specific ozone control strategies and attainment deadlines established

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[17] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 238. Similarly, EPA's staff concluded based on the extensive scientific record that an air quality level equivalent to the existing 0.12 ppm 1-hour NAAQS [*i.e.*, .09] "would reduce estimated exposures of the at-risk population sufficiently to provide some margin of safety.'" EPA, *Review of National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information* 167 (June, 1996), Ozone JA 1977. (emphasis added).

[18] Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (June 13, 1996).

[19] *See, e.g.*, 62 Fed. Reg. 38,883 (1997) ("margin of safety determinations . . . are largely judgmental in nature, particularly with respect to non-threshold pollutants, and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric").

[20] 62 Fed. Reg. 38,873 (1997), App. 74a-75a.

by Congress in Subpart 2 of the Act.[21] The record shows that besides disrupting ongoing ozone reductions, more restrictive NAAQS could increase unemployment, electricity rates, and the costs of food and other consumer products.[22]

Indeed, by EPA's own admission, the costs of full attainment of the revised ozone NAAQS (estimated by EPA at $9.6 billion per year) would outweigh its benefits (estimated by EPA at $1.5 to 8.5 billion per year).[23] Even at

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[21] *See* CAA Industry Respondents' Brief in Response, Argument § II; EPA's science advisers therefore recommended against a decision that would require different ozone NAAQS in different areas -- the consequence of EPA's final rule -- because of the confusion this would cause. *See, e.g.*, CASAC Tr. (Mar. 22, 1995), at 303, 308, Ozone JA 280, 282; CASAC Tr. (Sept. 19, 1995), at 235, Ozone JA 322; George T. Wolff, *Comments on February, 1995 Ozone Staff Paper* (Mar. 27, 1995), at 4, Ozone JA 383; Paulette Middleton, *Ozone Criteria Document Review* (Mar. 29, 1995), Ozone JA 387; *see also* 62 Fed. Reg. 38,861 ("[R]eductions in risks from both short-term and prolonged exposures can be achieved. . . with an averaging time of either 1 or 8 hours.").

[22] *See, e.g.*, AFBF Comments (Mar. 12, 1997) 1-3, Ozone JA 3318-20 (impacts on agricultural sector and increased food prices); Comments of Tennessee Valley Authority (filed Mar. 11, 1997), at 10, Ozone JA 3317 (11% increase in electric rates and job loss); Anne E. Smith, *et al., Costs, Economic Impacts, and Benefits of EPA's Ozone and Particulate Standards*, Reason Public Policy Inst. Policy Study No. 226 (June, 1997), at 9-12, Ozone JA 3323-26; Ralph L. Keeney and Kenneth Green, *Estimating Fatalities Induced by Economic Impacts of EPA's Ozone and Particulate Standards*, Reason Public Policy Inst. Policy Study No. 225 (June, 1997), at i, 13, Ozone JA 3327-28 (unemployment and income effects).

[23] *See* EPA, *Regulatory Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* at ES-13, ES-19, 7-11, 9-1 (1997) ("RIA"), Ozone JA 2920, 2926, 2932, 2934. The cost of attaining the revised particulate standards was

these costs, EPA was unable to identify control techniques for ozone and its precursors that would bring about nationwide attainment.[24]

CAA Industry Cross-Petitioners argued below that prior decisions of the D.C. Circuit should not be read to preclude EPA in this case from considering the overall impacts of its decision on society when deciding whether revising a NAAQS is "appropriate," and in choosing among alternative standard levels that cannot be distinguished from a public health protection standpoint when establishing an "adequate margin of safety." The court below briefly and emphatically rejected these arguments under *Chevron* step one, concluding based on *Lead Industries* that the CAA "on its face does not allow consideration of technological or economic feasibility," and that this prohibition extends to all of the impacts on society raised by CAA Industry Cross-Petitioners. EPA App. 19a.

REASONS FOR GRANTING THE PETITION

The holding of the court below that overall impacts on society may never be considered in choosing among alternative levels for a NAAQS presents an extreme and

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also high, $37 billion each year. *Id.* at 9-1, Ozone JA 2934. By contrast, only $17 billion was spent on *all* medical research in the United States in 1996. U.S. Dept. of Commerce, *Statistical Abstract of the United States 1998*, 118 Table 165.

[24] EPA therefore based its cost estimates for ozone on an assumed control cost of $10,000 per ton of pollution removed and for PM on a cost not exceeding $1 billion/$\mu g/m^3$. RIA at ES-11 to ES-12, Ozone JA 2918-19. EPA's estimate of the cost to attain the $PM_{2.5}$ standards reflected similar problems in identifying feasible control strategies. *Id.* at ES-12, Ozone JA 2919.

illogical reading of the Clean Air Act that will prevent the Agency from making sound risk management decisions on remand, and that will have serious adverse impacts on public health and welfare. It is a reading that is *not* compelled by the statute.

EPA's decisions regarding NAAQS are the single most costly "public health" based regulatory decisions made by any administrative agency. As EPA itself recognizes, the standards challenged here would impose costs on society of tens of billions of dollars each year. In the case of ozone, even EPA concedes that these costs may outweigh the benefits.

When, as here, scientific data does not clearly indicate the magnitude of a pollutant's impact on human health, EPA can only make a rational decision regarding how much to regulate -- or whether to revise an existing standard at all -- if it can consider the practical impacts of alternative decisions. A pollution level of debatable health significance might warrant further regulation if it can be reduced easily, with no collateral adverse effects. That same pollution level might not warrant more stringent regulation in the name of "public health" if regulation involved disrupting existing control programs, extraordinarily high costs, and collateral environmental damage. Yet the D.C. Circuit forbids EPA to consider precisely such factors in determining whether revision to an existing NAAQS is "appropriate," and in determining a standard that is "requisite to protect the public health" with an "adequate margin of safety."

Against this background, the lower court's decision disregards the need to protect public health on many fronts, with finite resources. As members of this Court have recognized, a profligate commitment of money and

technology to guard against one set of uncertain risks may result in inadequate means to cope with other more serious problems.[25] Furthermore, without consideration of the unavoidable relationship between the costs of goods produced and the capacity of the public to purchase such goods, stringent margins of safety designed to protect against *hypothetical risks* could have the effect of increasing the cost of -- and perhaps even denying to the poor and those on fixed incomes -- products such as electricity for heating and cooling that are essential to a healthful environment.[26] The lower court's decision therefore accepts regulation that produces only theoretical benefits for society while creating the prospect of potentially greater harm that does not benefit the "public."

These ideas deserve consideration in any review of the decision below. The pervasive reach of ambient standards under the Clean Air Act and the inconsistency of the D.C. Circuit's approach to the "margin of safety" concept, coupled with the fact that EPA already considers the broader impacts of its NAAQS decisions *sub silentio*,[27] suggest that resolution

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[25] *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle* 19 (1993); *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 669-70 (1980) (Powell, J., concurring).

[26] In his concurrence in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) for example, Justice Powell recognized that "the shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality." *Id.* at 272 (Powell, J., concurring).

[27] *See, e.g.*, David Schoenbrod, "Remarks to the Board of Trustees of the Natural Resources Defense Council," 20 *Cardozo L. Rev.* 767, 769 (1999) (In the 1970 CAA, Congress "wanted the agency to consider costs without implicating them. EPA has done so under Republicans and

of the question presented in this Conditional Cross-Petition has tremendous importance to the public and the American economy. Indeed, removing the judicially-imposed bar on consideration of factors other than possible direct health effects when EPA is confronted with uncertain and indistinguishable health risks would do no more than make EPA publicly accountable for how it weighs these other factors as a practical matter, and would allow judicial review of the way in which these factors influence EPA NAAQS decisions.

I. THE DECISION BELOW INTRUDES ON THE AGENCY'S ROLE IN DEFINING ITS AUTHORITY, AND IGNORES THE PURPOSES OF THE CLEAN AIR ACT.

In some CAA provisions, Congress restricted the exercise of the Administrator's discretion to certain factors. Section 110 of the Act, for example, requires EPA to consider only the factors listed in § 110 in approving state implementation plans ("SIPs").[28] In other provisions of the Act, however,

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Democrats alike."); *see also* CASAC Tr. (3/22/95) at 296-97, Ozone JA 278-79 ("a politically astute Administrator will certainly be mindful of [cost calculations]") ; Craig Oren, "Run Over by *American Trucking* Part I: Can EPA Revive its Air Quality Standards?", 29 *Envtl. L. Rev.* 10662 (Nov. 1999) ("EPA decisionmakers have admitted that they examine cost data when deciding on the levels of the standards."). Evaluating the cost of alternative regulatory options is, of course, required by CAA § 108(b) and is the purpose of EPA's Regulatory Impact Assessment ("RIA"). *See* RIA, *supra* note 23, at ES-2 to ES-3.

[28] *Union Electric,* 427 U.S. at 257 (1976). Once factors are enumerated, an agency may lack discretion to consider additional factors. For example, in *Union Electric v. EPA*, this Court held that section 110(a)(2)

Congress did not specify the factors for EPA to consider. Where factors are not specified, the Administrator must consider *all factors relevant to achieving the overall objectives of the Act as stated in its purposes section and legislative history.*[29]

This petition turns on the question whether the "adequate margin of safety" language of § 109(b), or the direction in § 109(d) that EPA revise NAAQS "as may be appropriate" in accordance with § 109(b), restricts the Agency's consideration of factors otherwise relevant to the exercise of risk management judgment. The lower court held emphatically that it does. EPA App. 19a-21a.

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of the Act, which stated that the Administrator "shall approve" plans that meet eight enumerated criteria, did not authorize the Administrator to reject such plans on grounds of technological or economic feasibility.

[29] *See Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). In *Whirlpool*, Justice Stewart, writing for a unanimous Court, analyzed the validity of an agency's regulation by examining its conformance with the "fundamental objective" of the Occupational Safety and Health Act. *Id.* at 11. *See also AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 734-35 (1999) ("The Act requires the FCC to apply *some* limiting standard rationally related to the goals of the Act"). Previously the Court of Appeals had itself illustrated the overriding importance of the purposes section of the Clean Air Act by ruling that section 101(b)(1) imposed upon the Administrator the obligation to establish a regulatory program that was not mentioned in the operative provisions of the Act. *See Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976), *vacated sub nom. Montana Power Co.* v. *EPA*, 434 U.S. 809 (1977); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973). Here Cross-Petitioners have urged that the purposes section be used in a more traditional sense -- to define the contours of general language in the Act's operative provisions.

But § 109 on its face contains no mandate that the Agency ignore the overall public well-being. As Judge Skelly Wright observed in *Lead Industries*, "[s]ection 109(b) does not specify precisely what Congress had in mind when it directed the Administrator to prescribe air quality standards that are 'requisite to protect the public health.'" 647 F.2d at 1152. Likewise Congress did not elaborate on either the "adequate margin of safety" language for setting NAAQS, or the "as may be appropriate" language of § 109(d) for revising NAAQS.

As the court of appeals observed in *Vinyl Chloride*, quoting this Court's opinion in *Industrial Union Dept.*, 448 U.S. at 642, "'safe' does not mean 'risk free,'" and a term like "ample" leaves EPA "great latitude in meeting its responsibility." 824 F.2d at 1153. If so, surely the word "adequate" in § 109 contemplates more latitude. Because the word "ample" "does not indicate that Congress intended to preclude consideration of *any* factor," *id.* at 1155 (emphasis added), the word "adequate" must allow consideration of a broad range of factors as well.

When the court in *Lead Industries* rejected the argument that § 109(b) "*required* the Administrator to consider economic and technological feasibility," 647 F.2d at 1148 (emphasis added), therefore, it was not because the language of § 109 on its face compelled this result. Rather the court relied on indicia of legislative intent that it drew from the statutory context, legislative history and structure of the Act.[30]

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[30] *But see* H.R. Rep. No. 95-294, at 127, *reprinted in* 4 1977 Legis. Hist., at 2594; *Hearings on S. 251, S. 252 and S. 253 Before Subcomm. on Environmental Pollution of Senate Comm. on Environment and Public*

In *Chevron, U.S.A. Inc v. Natural Resources Defense Council,* however, this Court held that it is not for the reviewing court to fill out the terms of a broad delegation of regulatory authority. Rather, where Congress has delegated in broad terms, it is for the agency to fill out the statutory provision "within the limits of [the congressional] delegation."[31]

Lead Industries' holding that § 109(b) does not "require" EPA to consider the costs and feasibility of pollution controls as factors that could override the basic public health protection goal of § 109 is sound. However, reading the *Lead Industries* to mean that EPA is *forbidden* from ever

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Works, 95th Cong., 1st Sess., Part 3, at 6-7 (1977); (making clear that Congress in § 109 rejected a "no-risk philosophy [that] ignores all social and economic consequences" and intended § 109 to be sufficiently flexible "to insure that public [health] policy is wise policy."); *see also id.* at 37 (statement of Sen. Muskie) (commenting that the national primary and secondary standards "were written as the minimal burden we could impose upon the dirty air areas of the country to clean up without bringing their economies to a screeching halt."), *see also supra* notes 5-7.

[31] 467 U.S. 837, 865 (1984); *see id.* at 843 (holding that the court does not impose its own interpretation of a statute when Congress has not clearly spoken to the issue); *see also Smiley v. Citibank,* 517 U.S. 735, 740-41 (1996) (explaining that deference accorded under *Chevron* is based on "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that *the ambiguity would be resolved, first and foremost, by the agency,* and desired the agency . . . to possess whatever degree of discretion the ambiguity allows.") (emphasis added); *Whirlpool,* 445 U.S. at 11 ("the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act."); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941) (remanding and directing NLRB "to give clear indication that it has exercised the discretion with which Congress has empowered it.").

balancing uncertain health risks against other indirect health risks as well as the costs and feasibility of controls when making risk management decisions, as the court below has done, is a mistake. Given the narrow issue presented in *Lead Industries*, Judge Wright's overbroad statement that economic and technological considerations can "play no part" in the promulgation of ambient standards should not be read to resolve issues not yet presented to the court, particularly in light of this Court's subsequent decision in *Chevron*. Rather, under *Chevron*, the Agency must look to the intent of Congress to give content to the broad delegation of authority in §§ 108 and 109 of the Clean Air Act.[32]

The fundamental objective of the Clean Air Act is to protect the public health without losing sight of economic and social realities. This objective is reflected in the Act's legislative history[33] and made explicit in its statement of

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[32] 467 U.S. at 842-43; *Smiley*, 517 U.S. at 740-41; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 48 (1983) (noting that the court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner"); *see also American Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1997) ("with its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review can occur *only when* agencies explain their decisions with precision, for 'it will not do for a court to be compelled to guess at the theory underlying the agency's action. . . .'" (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)) (emphasis added).

[33] The legislative history reveals that fulfillment of the Act's objectives necessitates attention to economic and feasibility considerations. As early as 1967, in enacting the first Air Quality Act, Pub. L. 90-148, 81 Stat. 485, Congress evidenced an intention that the development of air quality standards "be influenced not only by a concern for the protection of health or welfare, but also by economic, social and technological consideration." S. Rep. No. 90-403, at 28 (1967). In amending the Act

"purposes." Thus, § 101(b)(1) of the Act states that the purpose of the Act is "to protect and enhance the quality of the Nation's air resources *so as to promote* the *public health* and *welfare* and the *productive capacity* of its population." Clean Air Act § 101(b)(1), App. 1a (emphasis added). Framing Agency action to accommodate the three different statutory objectives calls for balancing.[34]

Similarly, in reviewing existing NAAQS under § 109(d), Congress required the Administrator to obtain, and by necessary implication to consider, the advice of an independent scientific review committee on "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of such NAAQS. CAA § 109(d)(2). EPA App. 113a. These factors cover the issues the Administrator would have to address to ensure that her decision furthers the purposes of the Act.

Finally, § 109(d)(1) calls for revision of standards as may be appropriate in accordance with "section 108 of this title and subsection (b)" of § 109. Section 108, in turn, calls for

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in 1977, Congress again emphasized that its purpose was to "insure the protection of the public health and the environment . . . while *at the same time considering the energy and economic needs of this Nation.*" H.R. Rep. No. 95-294, at 34-35 (1977), *reprinted in* 4 1977 Legis. Hist., at 2501-02 (emphasis added).

[34] The Administrator has long recognized the importance of economic and other factors to fulfillment of the Act's objectives set forth in § 101 (b) (1). Thus, in proposing the prevention of significant deterioration program the Administrator observed that the Agency cannot, and should not, decide on a regulatory approach without *"full consideration of its economic and social implications."* 38 Fed. Reg. 18,986 (1973) (emphasis added).

development of information on "all identifiable effects on public health *or welfare* which may be expected from the presence of such pollutant in the ambient air" *and* on the overall impacts of available methods for "prevention and control of air pollution." CAA § 108(a), (b), EPA App. 110a, App. 1a-2a (emphasis added).

Rather than forbidding the balancing of burdens and benefits, all of this language contemplates a well-informed policy decision that reflects the best balance of benefits and burdens to society. This is the essence of decisions formulating "*public* health" policy.

In sum, rational risk management decisions require that all costs and benefits be considered insofar as possible.[35] As one commentator observed, "camouflaging controversial policy decisions as science assists the agency in evading political, legal and institutional forces."[36] In the absence of clear statutory language establishing that Congress intended costs along with all other burdens on society to be ignored, it is unreasonable to assume that the Act bars consideration of

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[35] *See, e.g.*, Stephen Breyer & Richard Stewart, *Administrative Law & Reg. Policy* 350 (3d ed. 1992) ("How can the significance of a risk be determined in isolation from the cost of eliminating the risk?"); K. Arrow, *et al.*, "Is There a Role for Benefit-Cost Analysis in Environmental, Health and Safety Regulation?," 272 *Science* 221 (April 12, 1996) (advocating the use of cost benefit analyses in regulatory decisions on environmental protection); R. Morgenstern, ed., *Economic Analyses at EPA*, ix-x (Resources for the Future, Washington, D.C. 1997) ("T]hough it should never be the only factor on which to base a regulatory decision, economic analysis in its many forms should always be one of the factors.").

[36] Wendy Wagner, "The Science Charade in Toxic Risk Regulation," 95 *Colum. L. Rev.* 1613, 1617 (1995).

these factors in all cases, especially in light of Congress' broad statement of purposes and the specific information requirements of § 109(d) described above.

If the court below had recognized the Agency's authority to fill out the congressional delegation based on the purposes of the Act, therefore, it would have found unreasonable an interpretation of the statute that bars consideration of social, economic, and technological factors in making risk management decisions, when the Agency is confronted with a range of uncertain or indistinguishable health risks. The court, however, concluded its hands were tied by its earlier decision in *Lead Industries*. CAA Industry Petitioners believe that this aspect of the lower court's nondelegation holding is worthy of review by this Court, and do not oppose certiorari on the nondelegation issue if it is framed to address the D.C. Circuit's mistaken ban on considering the very factors most logically relevant to establishing an "intelligible principle" for risk management decisions under §§ 108 and 109.

II. ONLY THIS COURT CAN CORRECT THE SERIOUSLY FLAWED D.C. CIRCUIT LAW REGARDING THE CLEAN AIR ACT'S NAAQS PROGRAM.

The Clean Air Act provides that petitions for review of ambient standards may be filed only in the District of Columbia Circuit. CAA § 307(b)(1). This provision ensures that the issues presented in this petition will never be presented for decision in a forum other than the D.C. Circuit. Accordingly, review by this Court affords the only opportunity to correct a D.C. Circuit decision that will have

profound and pervasive economic and social consequences if left undisturbed.

CONCLUSION

For the reasons stated above, this Conditional Cross-Petition for Certiorari should be granted if certiorari is otherwise granted in this case.

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February 28, 2000

Supreme Court, U.S.
FILED
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No. ——

IN THE
Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Cross-Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Cross-Respondent

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Relevant Statutory Provisions

Excerpt from Section 101 of the Clean Air Act

§ 7401. Findings and purposes.

* * *

(b) The purposes of this title are –

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

* * *

Excerpt from Section 108 of the Clean Air Act

§ 7408. Air quality criteria and control techniques.

* * *

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental

impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

* * *

Subpart 2 of Part D of Title I of the Clean Air Act

Subpart 2—Additional Provisions for Ozone Nonattainment Areas

§ 7511. Classifications and attainment dates

(a) Classification and attainment dates for 1989 non-attainment areas

(1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate area, a serious area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

TABLE 1

Area class	Design value*	Primary standard attainment date**
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

* The design value is measured in parts per million (ppm).

** The primary standard attainment date is measured from November 15, 1990.

(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after November 15, 1990.

(3) At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice and comment and

judicial review) shall apply to such classification.

(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in table 1 of paragraph (1) of this subsection if-

(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

(b) New designations and reclassifications

(1) New designations to nonattainment

Any area that is designated attainment or unclassifiable for ozone under section 7407(d)(4) of this title, and that is subsequently redesignated to nonattainment for ozone under section 7407(d)(3) of this title, shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a) of this section. Upon its classification, the area shall be subject to the same requirements under section 7410 of this title, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3) of this section, except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between November 15, 1990, and the date the area is classified under this paragraph.

(2) Reclassification upon failure to attain

(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) of this section to the higher of--

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's

design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the re-classification, if any, described under subparagraph (A).

(3) Voluntary reclassification

The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) of this section to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) Failure of Severe Areas to attain standard

(A) If any Severe Area falls to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 7511d of this title shall apply within the area, the percent reduction requirements of section 7511a(c)(2)(B) and (C) of this title (relating to reasonable further progress demonstration and NO_x, control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the

sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 7511a(g) of this title, the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term "major source" and "major stationary source" shall have the same meaning as in Extreme Areas.

(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

(D) If, after November 15, 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

(c) References to terms

(1) Any reference in this subpart to a "Marginal Area", a "Moderate Area", a "Serious Area", a "Severe Area", or an "Extreme Area" shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

(2) Any reference in this subpart to "next higher classification" or comparable terms shall be considered a reference to the classification related to the next higher set of design values in table 1.

§ 7511a. Plan submissions and requirements

(a) Marginal Areas

Each State in which all or part of a Marginal Area is located shall, with respect to the Marginal Area (or portion thereof, to the extent specified in this subsection), submit to the Administrator the State implementation plan revisions (including the plan items) described under this subsection except to the extent the State has made such submissions as of November 15, 1990.

(1) Inventory

Within 2 years after November 15, 1990, the State shall submit a comprehensive, accurate, current inventory of actual emissions from all sources, as described in section 7502(c)(3) of this title, in accordance with guidance provided by the Administrator.

(2) Corrections to the State implementation plan

Within the periods prescribed in this paragraph, the State shall submit a revision to the State implementation plan that meets the following requirements-

(A) Reasonably available control technology corrections

For any Marginal Area (or, within the Administrator's discretion, portion thereof) the State shall submit, within 6 months of the date of classification under section 7511(a) of this title, a revision that includes such provisions to correct requirements in (or add requirements to) the plan concerning reasonably available control technology as were required under section 7502(b) of this title (as in effect immediately before November 15, 1990), as interpreted in guidance issued by the Administrator under section 7408 of this title before November 15, 1990.

(B) Savings clause for vehicle inspection and maintenance

(i) For any Marginal Area (or, within the Administrator's discretion, portion thereof), the plan for which already includes, or was required by section 7502(b)(ll)(B) of this title (as in effect immediately before November 15, 1990) to have included, a specific schedule for implementation of a vehicle emission control inspection and maintenance program, the State shall submit, immediately after November 15, 1990, a revision that includes any provisions necessary to provide for a vehicle inspection and maintenance program of no less stringency than that of either the program defined in House Report Numbered 95-294, 95th Congress, 1st Session, 281-291 (1977) as interpreted in guidance of the Administrator issued pursuant to section 7502(b)(ll)(B) of this title (as in effect immediately before November 15, 1990) or the program already included in the plan, whichever is more stringent.

(ii) Within 12 months after November 15,

1990, the Administrator shall review, revise, update, and republish in the Federal Register the guidance for the States for motor vehicle inspection and maintenance programs required by this chapter, taking into consideration the Administrator's investigations and audits of such program. The guidance shall, at a minimum, cover the frequency of inspections, the types of vehicles to be inspected (which shall include leased vehicles that are registered in the nonattainment area), vehicle maintenance by owners and operators, audits by the State, the test method and measures, including whether centralized or decentralized, inspection methods and procedures, quality of inspection, components covered, assurance that a vehicle subject to a recall notice from a manufacturer has complied with that notice, and effective implementation and enforcement, including ensuring that any retesting of a vehicle after a failure shall include proof of corrective action and providing for denial of vehicle registration in the case of tampering or misfueling. The guidance which shall be incorporated in the applicable State implementation plans by the States shall provide the States with continued reasonable flexibility to fashion effective, reasonable, and fair programs for the affected consumer. No later than 2 years after the Administrator promulgates regulations under section 7521(m)(3) of this title (relating to emission control diagnostics), the State shall submit a revision to such program to meet any requirements that the Administrator may prescribe under that section.

(C) Permit programs

Within 2 years after November 15, 1990, the State shall submit a revision that includes each of the following:

(i) Provisions to require permits, in accordance with sections 7502(c)(5) and 7503 of this title, for the construction and operation of each new or modified major stationary source (with respect to ozone) to be located in the area.

(ii) Provisions to correct requirements in (or add requirements to) the plan concerning permit programs as were required under section 7502(b)(6) of this title (as in effect immediately before November 15, 1990), as interpreted in regulations of the Administrator promulgated as of November 15, 1990.

(3) Periodic inventory

(A) General requirement

No later than the end of each 3-year period after submission of the inventory under paragraph (1) until the area is redesignated to attainment, the State shall submit a revised inventory meeting the requirements of subsection (a)(1) of this section.

(B) Emissions statements

(i) Within 2 years after November 15, 1990, the State shall submit a revision to the State implementation plan to require that the owner or operator of each stationary source of oxides of nitrogen or volatile organic compounds provide the State with a statement, in such form as the Administrator may prescribe (or accept an equivalent alternative developed by the State), for classes or categories of sources, showing the actual emissions of oxides of nitrogen and volatile organic

compounds from that source. The first such statement shall be submitted within 3 years after November 15, 1990. Subsequent statements shall be submitted at least every year thereafter. The statement shall contain a certification that the information contained in the statement is accurate to the best knowledge of the individual certifying the statement.

(ii) The State may waive the application of clause (i) to any class or category of stationary sources which emit less than 25 tons per year of volatile organic compounds or oxides of nitrogen if the State, in its submissions under subparagraphs (1) or (3)(A), provides an inventory of emissions from such class or category of sources, based on the use of the emissions factors established by the Administrator or other methods acceptable to the Administrator.

(4) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increased emissions of such air pollutant shall be at least 1.1 to 1.

The Administrator may, in the Administrator's discretion, require States to submit a schedule for submitting any of the revisions or other items required under this subsection. The requirements of this subsection shall apply in lieu of any requirement that the State submit a demonstration that the applicable implementation plan provides for attainment of the ozone standard by the applicable attainment date in any Marginal Area. Section 7502(c)(9) of this title (relating to contingency measures) shall not apply to Marginal Areas.

(b) Moderate Areas

Each State in which all or part of a Moderate Area is located shall, with respect to the Moderate Area, make the submissions described under subsection (a) of this section (relating to Marginal Areas), and shall also submit the revisions to the applicable implementation plan described under this subsection.

(1) Plan provisions for reasonable further progress

(A) General rule

(i) By no later than 3 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for volatile organic compound emission reductions, within 6 years after November 15, 1990, of at least 15 percent from baseline emissions, accounting for any growth in emissions after 1990. Such plan shall provide for such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter. This subparagraph shall not apply in the case of oxides of nitrogen for those areas for which the Administrator determines (when the Administrator approves the plan or plan revision) that additional reductions of oxides of nitrogen would not contribute to attainment.

(ii) A percentage less than 15 percent may be used for purposes of clause (i) in the case of any State which demonstrates to the satisfaction of the

Administrator that-

(I) new source review provisions are applicable in the nonattainment areas in the same manner and to the same extent as required under subsection (e) of this section in the case of Extreme Areas (with the exception that, in applying such provisions, the terms "major source" and "major stationary source" shall include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 5 tons per year of volatile organic compounds);

(II) reasonably available control technology is required for all existing major sources (as defined in subclause (I)); and

(III) the plan reflecting a lesser percentage than 15 percent includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To qualify for a lesser percentage under this clause, a State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher category.

(B) Baseline emissions

For purposes of subparagraph (A), the term "baseline emissions" means the total amount of actual VOC or NO_x

emissions from all anthropogenic sources in the area during the calendar year 1990, excluding emissions that would be eliminated under the regulations described in clauses (i) and (ii) of subparagraph (D).

(C) General rule for creditability of reductions

Except as provided under subparagraph (D), emissions reductions are creditable toward the 15 percent required under subparagraph (A) to the extent they have actually occurred, as of 6 years after November 15, 1990, from the implementation of measures required under the applicable implementation plan, rules promulgated by the Administrator, or a permit under subchapter V of this chapter.

(D) Limits on creditability of reductions

Emission reductions from the following measures are not creditable toward the 15 percent reductions required under subparagraph (A):

(i) Any measure relating to motor vehicle exhaust or evaporative emissions promulgated by the Administrator by January 1, 1990.

(ii) Regulations concerning Reid Vapor Pressure promulgated by the Administrator by November 15, 1990, or required to be promulgated under section 7545(h) of this title.

(iii) Measures required under subsection (a)(2)(A) of this section (concerning corrections to implementation plans prescribed under guidance by the Administrator).

(iv) Measures required under subsection (a)(2)(B) of this section to be submitted immediately after November 15, 1990 (concerning corrections to motor vehicle inspection and maintenance programs).

(2) Reasonably available control technology

The State shall submit a revision to the applicable implementation plan to include provisions to require the implementation of reasonably available control technology under section 7502(c)(1) of this title with respect to each of the following:

(A) Each category of VOC sources in the area covered by a CTG document issued by the Administrator between November 15, 1990, and the date of attainment.

(B) All VOC sources in the area covered by any CTG issued before November 15, 1990.

(C) All other major stationary sources of VOCs that are located in the area.

Each revision described in subparagraph (A) shall be submitted within the period set forth by the Administrator in issuing the relevant CTG document. The revisions with respect to sources described in subparagraphs (B) and (C) shall be submitted by 2 years after November 15, 1990, and shall provide for the implementation of the required measures as expeditiously as practicable but no later than May 31, 1995.

(3) Gasoline vapor recovery

(A) General rule

Not later than 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to require all owners or operators of gasoline dispensing systems to install and operate, by the date prescribed under subparagraph (B), a system for gasoline vapor recovery of emissions from the fueling of motor vehicles. The Administrator shall issue guidance as appropriate as to the effectiveness of such system. This subparagraph shall apply only to facilities which sell more than 10,000 gallons of gasoline per month (50,000 gallons per month in the case of an independent small business marketer of gasoline as defined in section 7625-1 of this title).

(B) Effective date

The date required under subparagraph (A) shall be-

(i) 6 months after the adoption date, in the case of gasoline dispensing facilities for which construction commenced after November 15, 1990;

(ii) one year after the adoption date, in the case of gasoline dispensing facilities which dispense at least 100,000 gallons of gasoline per month, based on average monthly sales for the 2-year period before the adoption date; or

(iii) 2 years after the adoption date, in the case of all other gasoline dispensing facilities.

Any gasoline dispensing facility described under both clause (i) and clause (ii) shall meet the requirements of clause

(i).

(C) Reference to terms

For purposes of this paragraph, any reference to the term "adoption date" shall be considered a reference to the date of adoption by the State of requirements for the installation and operation of a system for gasoline vapor recovery of emissions from the fueling of motor vehicles.

(4) Motor vehicle inspection and maintenance

For all Moderate Areas, the State shall submit, immediately after November 15, 1990, a revision to the applicable implementation plan that includes provisions necessary to provide for a vehicle inspection and maintenance program as described in subsection (a)(2)(B) of this section (without regard to whether or not the area was required by section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) to have included a specific schedule for implementation of such a program).

(5) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase emissions of such air pollutant shall be at least 1.15 to 1.

(c) Serious Areas

Except as otherwise specified in paragraph (4), each State in which all or part of a Serious Area is located shall, with respect to the Serious Area (or portion thereof, to the extent

specified in this subsection), make the submissions described under subsection (b) of this section (relating to Moderate Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Serious Area, the terms "major source" and "major stationary source" include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 50 tons per year of volatile organic compounds.

(1) Enhanced monitoring

In order to obtain more comprehensive and representative data on ozone air pollution, not later than 18 months after November 15, 1990, the Administrator shall promulgate rules, after notice and public comment, for enhanced monitoring of ozone, oxides of nitrogen, and volatile organic compounds. The rules shall, among other things, cover the location and maintenance of monitors. Immediately following the promulgation of rules by the Administrator relating to enhanced monitoring, the State shall commence such actions as may be necessary to adopt and implement a program based on such rules, to improve monitoring for ambient concentrations of ozone, oxides of nitrogen and volatile organic compounds and to improve monitoring of emissions of oxides of nitrogen and volatile organic compounds. Each State implementation plan for the area shall contain measures to improve the ambient monitoring of such air pollutants.

(2) Attainment and reasonable further progress demonstrations

Within 4 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan that includes each of the following:

(A) Attainment demonstration

A demonstration that the plan, as revised, will provide for attainment of the ozone national ambient air quality standard by the applicable attainment date. This attainment demonstration must be based on photochemical grid modeling or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.

(B) Reasonable further progress demonstration

A demonstration that the plan, as revised, will result in VOC emissions reductions from the baseline emissions described in subsection (b)(1)(B) of this section equal to the following amount averaged over each consecutive 3-year period beginning 6 years after November 15, 1990, until the attainment date:

(i) at least 3 percent of baseline emissions each year; or

(ii) an amount less than 3 percent of such baseline emissions each year, if the State demonstrates to the satisfaction of the Administrator that the plan reflecting such lesser amount includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To lessen the 3 percent requirement under clause (ii), a

State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher classification. Any determination to lessen the 3 percent requirement shall be reviewed at each milestone under subsection (g) of this section and revised to reflect such new measures (if any) achieved in practice by sources in the same category in any State, allowing a reasonable time to implement such measures. The emission reductions described in this subparagraph shall be calculated in accordance with subsection (b)(1)(C) and (D) of this section (concerning creditability of reductions). The reductions creditable for the period beginning 6 years after November 15, 1990, shall include reductions that occurred before such period, computed in accordance with subsection (b)(1) of this section, that exceed the 15-percent amount of reductions required under subsection (b)(1)(A) of this section.

(C) NO_x control

The revision may contain, in lieu of the demonstration required under subparagraph (B), a demonstration to the satisfaction of the Administrator that the applicable implementation plan, as revised, provides for reductions of emissions of VOC's and oxides of nitrogen (calculated according to the creditability provisions of subsection (b)(1)(C) and (D) of this section), that would result in a reduction in ozone concentrations at least equivalent to that which would result from the amount of VOC emission reductions required under subparagraph (B). Within 1 year after November 15, 1990, the Administrator shall issue guidance concerning the conditions under which NO_x control may be substituted for VOC control or may be combined with VOC control in order to maximize the reduction in ozone air

pollution. In accord with such guidance, a lesser percentage of VOCs may be accepted as an adequate demonstration for purposes of this subsection.

(3) Enhanced vehicle inspection and maintenance program

(A) Requirement for submission

Within 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for an enhanced program to reduce hydrocarbon emissions and NO_x emissions from in-use motor vehicles registered in each urbanized area (in the nonattainment area), as defined by the Bureau of the Census, with a 1980 population of 200,000 or more.

(B) Effective date of State programs; guidance

The State program required under subparagraph (A) shall take effect no later than 2 years from November 15, 1990, and shall comply in all respects with guidance published in the Federal Register (and from time to time revised) by the Administrator for enhanced vehicle inspection and maintenance programs. Such guidance shall include--

(i) a performance standard achievable by a program combining emission testing, including on-road emission testing, with inspection to detect tampering with emission control devices and misfueling for all light-duty vehicles and all light-duty trucks subject to standards under section 7521 of this title; and

(ii) program administration features necessary

to reasonably assure that adequate management resources, tools, and practices are in place to attain and maintain the performance standard.

Compliance with the performance standard under clause (i) shall be determined using a method to be established by the Administrator.

(C) State program

The State program required under subparagraph (A) shall include, at a minimum, each of the following elements-

(i) Computerized emission analyzers, including on-road testing devices.

(ii) No waivers for vehicles and parts covered by the emission control performance warranty as provided for in section 7541(b) of this title unless a warranty remedy has been denied in writing, or for tampering-related repairs.

(iii) In view of the air quality purpose of the program, if, for any vehicle, waivers are permitted for emissions-related repairs not covered by warranty, an expenditure to qualify for the waiver of an amount of $450 or more for such repairs (adjusted annually as determined by the Administrator on the basis of the Consumer Price Index in the same manner as provided in subchapter V of this chapter).

(iv) Enforcement through denial of vehicle registration (except for any program in operation before November 15, 1990, whose enforcement mechanism is

demonstrated to the Administrator to be more effective than the applicable vehicle registration program in assuring that noncom-plying vehicles are not operated on public roads).

(v) Annual emission testing and necessary adjustment, repair, and maintenance, unless the State demonstrates to the satisfaction of the Administrator that a biennial inspection, in combination with other features of the program which exceed the requirements of this chapter, will result in emission reductions which equal or exceed the reductions which can be obtained through such annual inspections.

(vi) Operation of the program on a centralized basis, unless the State demonstrates to the satisfaction of the Administrator that a decentralized program will be equally effective. An electronically connected testing system, a licensing system, or other measures (or any combination thereof) may be considered, in accordance with criteria established by the Administrator, as equally effective for such purposes.

(vii) Inspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems.

Each State shall biennially prepare a report to the Administrator which assesses the emission reductions achieved by the program required under this paragraph based on data collected during inspection and repair of vehicles. The methods used to assess the emission reductions shall be those established by the Administrator.

(4) Clean fuel vehicle programs

(A) Except to the extent that substitute provisions have been approved by the Administrator under subparagraph (B), the State shall submit to the Administrator, within 42 months of November 15, 1990, a revision to the applicable implementation plan for each area described under part C of subchapter II of this chapter to include such measures as may be necessary to ensure the effectiveness of the applicable provisions of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter, including all measures necessary to make the use of clean alternative fuels in clean-fuel vehicles (as defined in part C of subchapter II of this chapter) economic from the standpoint of vehicle owners. Such a revision shall also be submitted for each area that opts into the clean fuel-vehicle program as provided in part C of subchapter II of this chapter.

(B) The Administrator shall approve, as a substitute for all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter, any revision to the relevant applicable implementation plan that in the Administrator's judgment will achieve long-term reductions in ozone-producing and toxic air emissions equal to those achieved under part C of subchapter II of this chapter, or the percentage thereof attributable to the portion of the clean-fuel vehicle program for which the revision is to substitute. The Administrator may approve such revision only if it consists exclusively of provisions other than those required under this chapter for the area. Any State seeking approval of such revision must submit the revision to the Administrator within 24 months of November 15, 1990. The Administrator shall approve or disapprove any such revision within 30

months of November 15, 1990. The Administrator shall publish the revision submitted by a State in the Federal Register upon receipt. Such notice shall constitute a notice of proposed rulemaking on whether or not to approve such revision and shall be deemed to comply with the requirements concerning notices of proposed rulemaking contained in sections 553 through 557 of title 5 (related to notice and comment). Where the Administrator approves such revision for any area, the State need not submit the revision required by subparagraph (A) for the area with respect to the portions of the Federal clean-fuel vehicle program for which the Administrator has approved the revision as a substitute.

(C) If the Administrator determines, under section 7509 of this title, that the State has failed to submit any portion of the program required under subparagraph (A), then, in addition to any sanctions available under section 7509 of this title, the State may not receive credit, in any demonstration of attainment or reasonable further progress for the area, for any emission reductions from implementation of the corresponding aspects of the Federal clean-fuel vehicle requirements established in part C of subchapter II of this chapter.

(5) Transportation control

(A) Beginning 6 years after November 15, 1990, and each third year thereafter, the State shall submit a demonstration as to whether current aggregate vehicle mileage, aggregate vehicle emissions, congestion levels, and other relevant parameters are consistent with those used for the area's demonstration of attainment. Where such parameters and emissions levels exceed the levels projected for purposes of the area's attainment demonstration, the State

shall within 18 months develop and submit a revision of the applicable implementation plan that includes a transportation control measures program consisting of measures from, but not limited to, section 7408(f) of this title that will reduce emissions to levels that are consistent with emission levels projected in such demonstration. In considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(e) of this title and with the requirements of section 7504(b) of this title and shall include implementation and funding schedules that achieve expeditious emissions reductions in accordance with implementation plan projections.

(6) De minimis rule

The new source review provisions under this part shall ensure that increased emissions of volatile organic compounds resulting from any physical change in, or change in the method of operation of, a stationary source located in the area shall not be considered de minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

(7) Special rule for modifications of sources emitting less than 100 tons

In the case of any major stationary source of volatile organic compounds located in the area (other than a source which emits or has the potential to emit 100 tons or more of volatile organic compounds per year), whenever any change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that such increase shall not be considered a modification for such purposes if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds concerned from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. If the owner or operator does not make such election, such change shall be considered a modification for such purposes, but in applying section 7503(a)(2) of this title in the case of any such modification, the best available control technology (BACT), as defined in section 7479 of this title, shall be substituted for the lowest achievable emission rate (LAER). The Administrator shall establish and publish policies and procedures for implementing the provisions of this paragraph.

(8) Special rule for modifications of sources emitting 100 tons or more

In the case of any major stationary source of volatile organic compounds located in the area which emits or has the potential to emit 100 tons or more of volatile organic compounds per year, whenever any change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile

organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1, the requirements of section 7503(a)(2) of this title (concerning the lowest achievable emission rate (LAER)) shall not apply.

(9) Contingency provisions

In addition to the contingency provisions required under section 7502(c)(9) of this title, the plan revision shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone. Such measures shall be included in the plan revision as contingency measures to take effect without further action by the State or the Administrator upon a failure by the State to meet the applicable milestone.

(10) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase emissions of such air pollutant shall be at least 1.2 to 1.

Any reference to "attainment date" in subsection (b) of this section, which is incorporated by reference into this subsection, shall refer to the attainment date for serious areas.

(d) Severe Areas

Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) of this section (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Severe Area, the terms "major source" and "major stationary source" include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of volatile organic compounds.

(1) Vehicle miles traveled

(A) Within 2 years after November 15, 1990, the State shall submit a revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of sub-section (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements). The State shall consider measures specified in section 7408(f) of this title, and choose from among and implement such measures as necessary to demonstrate attainment with the national ambient air quality standards; in considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them.

(B) The State may also, in its discretion, submit a revision at any time requiring employers in such area to implement programs to reduce work-related vehicle trips and miles travelled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and may require that employers in such area increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city, business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. Any State required to submit a revision under this subparagraph (as in effect before December 23, 1995) containing provisions requiring employers to reduce work-related vehicle trips and miles travelled by employees may, in accordance with State law, remove such provisions from the implementation plan, or withdraw its submission, if the State notifies the administrator, in writing, that the State has undertaken, or will undertake, one or more alternative methods that will achieve emission reductions equivalent to those to be achieved by the removed or withdrawn provisions.

(2) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.3 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of

this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(3) Enforcement under section 7511d

By December 31, 2000, the State shall submit a plan revision which includes the provisions required under section 7511d of this title.

Any reference to the term "attainment date" in subsection (b) or (c) of this section, which is incorporated by reference into this subsection (d), shall refer to the attainment date for Severe Areas.

(e) Extreme Areas

Each State in which all or part of an Extreme Area is located shall, with respect to the Extreme Area, make the submissions described under subsection (d) of this section (relating to Severe Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. The provisions of clause (ii) of sub-section (c)(2)(B) of this section (relating to reductions of less than 3 percent), the provisions of paragraphs s (6), (7) and (8) of subsection (c) of this section (relating to de minimus rule and modification of sources), and the provisions of clause (ii) of subsection (b)(1)(A) of this section (relating to reductions of less than 15 percent) shall not apply in the case of an Extreme Area. For any Extreme Area, the terms "major source" and "major stationary source" includes (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 10 tons per year of volatile

organic compounds.

(1) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.5 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(2) Modifications

Any change (as described in section 7411(a)(4) of this title) at a major stationary source which results in any increase in emissions from any discrete operation, unit, or other pollutant emitting activity at the source shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that for purposes of complying with the offset requirement pursuant to section 7503(a)(1) of this title, any such increase shall not be considered a modification if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of the air pollutant concerned from other discrete operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. The offset requirements of this part shall not be applicable in Extreme Areas to a modification of an existing source if such modification consists of installation of equipment required to comply with the applicable implementation plan, permit, or this chapter.

(3) Use of clean fuels or advanced control technology

For Extreme Areas, a plan revision shall be submitted within 3 years after November 15, 1990, to require, effective 8 years after November 15, 1990, that each new, modified, and existing electric utility and industrial and commercial boiler which emits more than 25 tons per year of oxides of nitrogen-

(A) burn as its primary fuel natural gas, methanol, or ethanol (or a comparably low polluting fuel), or

(B) use advanced control technology (such as catalytic control technology or other comparably effective control methods) for reduction of emissions of oxides of nitrogen.

For purposes of this subsection, the term "primary fuel" means the fuel which is used 90 percent or more of the operating time. This paragraph shall not apply during any natural gas supply emergency (as defined in title III of the Natural Gas Policy Act of 1978 (15 U.S.C. 3361 et seq.]).

(4) Traffic control measures during heavy traffic hours

For Extreme Areas, each implementation plan revision under this subsection may contain provisions establishing traffic control measures applicable during heavy traffic hours to reduce the use of high polluting vehicles or heavy-duty vehicles, notwithstanding any other provision of law.

(5) New technologies

The Administrator may, in accordance with section 7410 of this title, approve provisions of an implementation plan for an Extreme Area which anticipate development of new control

techniques or improvement of existing control technologies, and an attainment demonstration based on such provisions, if the State demonstrates to the satisfaction of the Administrator that-

(A) such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after November 15, 1990; and

(B) the State has submitted enforceable commitments to develop and adopt contingency measures to be implemented as set forth herein if the anticipated technologies do not achieve planned reductions.

Such contingency measures shall be submitted to the Administrator no later than 3 years before proposed implementation of the plan provisions and approved or disapproved by the Administrator in accordance with section 7410 of this title. The contingency measures shall be adequate to produce emission reductions sufficient, in conjunction with other approved plan provisions, to achieve the periodic emission reductions required by subsection (b)(1) or (c)(2) of this section and attainment by the applicable dates. If the Administrator determines that an Extreme Area has failed to achieve an emission reduction requirement set forth in subsection (b)(1) or (c)(2) of this section, and that such failure is due in whole or part to an inability to fully implement provisions approved pursuant to this subsection, the Administrator shall require the State to implement the contingency measures to the extent necessary to assure compliance with subsections (b)(1) and (c)(2) of this section.

Any reference to the term "attainment date" in subsection (b), (c), or (d) of this section which is incorporated by reference

into this subsection, shall refer to the attainment date for Extreme Areas.

(f) NO_x requirements

(1) The plan provisions required under this subpart for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in section 7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen. This subsection shall not apply in the case of oxides of nitrogen for those sources for which the Administrator determines (when the Administrator approves a plan or plan revision) that net air quality benefits are greater in the absence of reductions of oxides of nitrogen from the sources concerned. This subsection shall also not apply in the case of oxides of nitrogen for-

(A) nonattainment areas not within an ozone transport region under section 7511c of this title, if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides or nitrogen would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

(B) nonattainment areas within such an ozone transport region if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides of nitrogen would not produce net ozone air quality benefits in such region.

The Administrator shall, in the Administrator's determinations, consider the study required under section 7511f of this title.

(2)(A) If the Administrator determines that excess reductions in emissions of NO_x would be achieved under paragraph (1), the Administrator may limit the application of paragraph (1) to the extent necessary to avoid achieving such excess reductions.

(B) For purposes of this paragraph, excess reductions in emissions of NO_x are emission reductions for which the Administrator determines that net air quality benefits are greater in the absence of such reductions. Alternatively, for purposes of this paragraph, excess reductions in emissions of NO_x are, for--

(i) nonattainment areas not within an ozone transport region under section 7511c of this title, emission reductions that the Administrator determines would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

(ii) nonattainment areas within such ozone transport region, emission reductions that the Administrator determines would not produce net ozone air quality benefits in such region.

(3) At any time after the final report under section 7511f of this title is submitted to Congress, a person may petition the Administrator for a determination under paragraph (1) or (2) with respect to any nonattainment area or any ozone transport region under section 7511c of this title. The Administrator shall grant or deny such petition within 6 months after its filing with the Administrator.

(g) Milestones

(1) Reductions in emissions

6 years after November 15, 1990, and at intervals of every 3 years thereafter, the State shall determine whether each nonattainment area (other than an area classified as Marginal or Moderate) has achieved a reduction in emissions during the preceding intervals equivalent to the total emission reductions required to be achieved by the end of such interval pursuant to subsection (b)(1) of this section and the corresponding requirements of subsections (c)(2)(B) and (C), (d), and (e) of this section. Such reduction shall be referred to in this section as an applicable milestone.

(2) Compliance demonstration

For each nonattainment area referred to in paragraph (1), not later than 90 days after the date on which an applicable milestone occurs (not including an attainment date on which a milestone occurs in cases where the standard has been attained), each State in which all or part of such area is located shall submit to the Administrator a demonstration that the milestone has been met. A demonstration under this paragraph shall be submitted in such form and manner, and shall contain such information and analysis, as the Administrator shall require, by rule. The Administrator shall determine whether or not a State's demonstration is adequate within 90 days after the Administrator's receipt of a demonstration which contains the information and analysis required by the Administrator.

(3) Serious and Severe Areas; State election

If a State fails to submit a demonstration under paragraph (2) for any Serious or Severe Area within the required period

or if the Administrator determines that the area has not met any applicable milestone, the State shall elect, within 90 days after such failure or determination-

(A) to have the area reclassified to the next higher classification,

(B) to implement specific additional measures adequate, as determined by the Administrator, to meet the next milestone as provided in the applicable contingency plan, or

(C) to adopt an economic incentive program as described in paragraph (4).

If the State makes an election under subparagraph (B), the Administrator shall, within 90 days after the election, review such plan and shall, if the Administrator finds the contingency plan inadequate, require further measures necessary to meet such milestone. Once the State makes an election, it shall be deemed accepted by the Administrator as meeting the election requirement. If the State fails to make an election required under this paragraph within the required 90-day period or within 6 months thereafter, the area shall be reclassified to the next higher classification by operation of law at the expiration of such 6-month period. Within 12 months after the date required for the State to make an election, the State shall submit a revision of the applicable implementation plan for the area that meets the requirements of this paragraph. The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(4) Economic incentive program

(A) An economic incentive program under this paragraph shall be consistent with rules published by the Administrator and sufficient, in combination with other elements of the State plan, to achieve the next milestone. The State program may include a nondiscriminatory system, consistent with applicable law regarding interstate commerce, of State established emissions fees or a system of marketable permits, or a system of State fees on sale or manufacture of products the use of which contributes to ozone formation, or any combination of the foregoing or other similar measures. The program may also include incentives and requirements to reduce vehicle emissions and vehicle miles traveled in the area, including any of the transportation control measures identified in section 7408(f) of this title.

(B) Within 2 years after November 15, 1990, the Administrator shall publish rules for the programs to be adopted pursuant to subparagraph (A). Such rules shall include model plan provisions which may be adopted for reducing emissions from permitted stationary sources, area sources, and mobile sources. The guidelines shall require that any revenues generated by the plan provisions adopted pursuant to subparagraph (A) shall be used by the State for any of the following:

(i) Providing incentives for achieving emission reductions.

(ii) Providing assistance for the development of innovative technologies for the control of ozone air pollution and for the development of lower-polluting solvents and surface coatings. Such assistance shall not provide for the payment of more than 75 percent of either the costs of any project to develop such a

technology or the costs of development of a lower-polluting solvent or surface coating.

(iii) Funding the administrative costs of State programs under this chapter. Not more than 50 percent of such revenues may be used for purposes of this clause.

(5) Extreme Areas

If a State fails to submit a demonstration under paragraph (2) for any Extreme Area within the required period, or if the Administrator determines that the area has not met any applicable milestone, the State shall, within 9 months after such failure or determination, submit a plan revision to implement an economic incentive program which meets the requirements of paragraph (4). The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(h) Rural transport areas

(1) Notwithstanding any other provision of section 7511 of this title or this section, a State containing an ozone nonattainment area that does not include, and is not adjacent to, any part of a Metropolitan Statistical Area or, where one exists, a Consolidated Metropolitan Statistical Area (as defined by the United States Bureau of the Census), which area is treated by the Administrator, in the Administrator's discretion, as a rural transport area within the meaning of paragraph (2), shall be treated by operation of law as satisfying the requirements of this section if it makes the submissions required under subsection (a) of this section (relating to marginal areas).

(2) The Administrator may treat an ozone nonattainment area as a rural transport area if the Administrator finds that sources of VOC (and, where the Administrator determines relevant, NO_x) emissions within the area do not make a significant contribution to the ozone concentrations measured in the area or in other areas.

(i) Reclassified areas

Each State containing an ozone nonattainment area reclassified under section 7511(b)(2) of this title shall meet such requirements of subsections (b) through (d) of this section as may be applicable to the area as reclassified, according to the schedules prescribed in connection with such requirements, except that the Administrator may adjust any applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions.

(j) Multi-State ozone nonattainment areas

(1) Coordination among States

Each State in which there is located a portion of a single ozone nonattainment area which covers more than one State (hereinafter in this section referred to as a "multi-State ozone nonattainment area") shall--

(A) take all reasonable steps to coordinate, substantively and procedurally, the revisions and implementation of State implementation plans applicable to the nonattainment area concerned; and

(B) use photochemical grid modeling or any other analytical method determined by the Administrator, in his discretion, to be at least as effective.

The Administrator may not approve any revision of a State implementation plan submitted under this part for a State in which part of a multi-State ozone nonattainment area is located if the plan revision for that State fails to comply with the requirements of this sub-section.

(2) Failure to demonstrate attainment

If any State in which there is located a portion of a multi-State ozone nonattainment area fails to provide a demonstration of attainment of the national ambient air quality standard for ozone in that portion within the required period, the State may petition the Administrator to make a finding that the State would have been able to make such demonstration but for the failure of one or more other States in which other portions of the area are located to commit to the implementation of all measures required under this section (relating to plan submissions and requirements for ozone nonattainment areas). If the Administrator makes such finding, the provisions of section 7509 of this title (relating to sanctions) shall not apply, by reason of the failure to make such demonstration, in the portion of the multi-State ozone nonattainment area within the State submitting such petition.

§ 7511b. Federal ozone measures

(a) Control techniques guidelines for VOC sources

Within 3 years after November 15, 1990, the Administrator shall issue control techniques guidelines, in

accordance with section 7408 of this title, for 11 categories of stationary sources of VOC emissions for which such guidelines have not been issued as of November 15, 1990, not including the categories referred to in paragraphs (3) and (4) of subsection (b) of this section. The Administrator may issue such additional control techniques guidelines as the Administrator deems necessary.

(b) Existing and new CTGS

(1) Within 36 months after November 15, 1990, and periodically thereafter, the Administrator shall review and, if necessary, update control technique guidance issued under section 7408 of this title before November 15, 1990.

(2) In issuing the guidelines the Administrator shall give priority to those categories which the Administrator considers to make the most significant contribution to the formation of ozone air pollution in ozone nonattainment areas, including hazardous waste treatment, storage, and disposal facilities which are permitted under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.]. Thereafter the Administrator shall periodically review and, if necessary, revise such guidelines.

(3) Within 3 years after November 15, 1990, the Administrator shall issue control techniques guidelines in accordance with section 7408 of this title to reduce the aggregate emissions of volatile organic compounds into the ambient air from aerospace coatings and solvents. Such control techniques guidelines shall, at a minimum, be adequate to reduce aggregate emissions of volatile organic compounds into the ambient air from the application of such coatings and solvents to such level as the Administrator determines may be

achieved through the adoption of best available control measures. Such control technology guidance shall provide for such reductions in such increments and on such schedules as the Administrator determines to be reasonable, but in no event later than 10 years after the final issuance of such control technology guidance. In developing control technology guidance under this subsection, the Administrator shall consult with the Secretary of Defense, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration with regard to the establishment of specifications for such coatings. In evaluating VOC reduction strategies, the guidance shall take into account the applicable requirements of section 7412 of this title and the need to protect stratospheric ozone.

(4) Within 3 years after November 15, 1990, the Administrator shall issue control techniques guidelines in accordance with section 7408 of this title to reduce the aggregate emissions of volatile organic compounds and PM-10 into the ambient air from paints, coatings, and solvents used in shipbuilding operations and ship repair. Such control techniques guidelines shall, at a minimum, be adequate to reduce aggregate emissions of volatile organic compounds and PM-10 into the ambient air from the removal or application of such paints, coatings, and solvents to such level as the Administrator determines may be achieved through the adoption of the best available control measures. Such control techniques guidelines shall provide for such reductions in such increments and on such schedules as the Administrator determines to be reasonable, but in no event later than 10 years after the final issuance of such control technology guidance. In developing control techniques guidelines under this subsection, the Administrator shall consult with the appropriate Federal agencies.

(c) Alternative control techniques

Within 3 years after November 15, 1990, the Administrator shall issue technical documents which identify alternative controls for all categories of stationary sources of volatile organic compounds and oxides of nitrogen which emit, or have the potential to emit 25 tons per year or more of such air pollutant. The Administrator shall revise and update such documents as the Administrator determines necessary.

(d) Guidance for evaluating cost-effectiveness

Within 1 year after November 15, 1990, the Administrator shall provide guidance to the States to be used in evaluating the relative cost-effectiveness of various options for the control of emissions from existing stationary sources of air pollutants which contribute to nonattainment of the national ambient air quality standards for ozone.

(e) Control of emissions from certain sources

(1) Definitions

For purposes of this subsection-

(A) Best available controls

The term "best available controls" means the degree of emissions reduction that the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical

reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal.

(B) Consumer or commercial product

The term "consumer or commercial product" means any substance, product (including paints, coatings, and solvents), or article (including any container or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of volatile organic compounds. The term does not include fuels or fuel additives regulated under section 7545 of this title, or motor vehicles, non-road vehicles, and non-road engines as defined under section 7550 of this title.

(C) Regulated entities

The term "regulated entities" means

(i) manufacturers, processors, wholesale distributors, or importers of consumer or commercial products for sale or distribution in interstate commerce in the United States; or

(ii) manufacturers, processors, wholesale distributors, or importers that supply the entities listed under clause (i) with such products for sale or distribution in interstate commerce in the United States.

(2) Study and report

(A) Study

The Administrator shall conduct a study of the emissions

of volatile organic compounds into the ambient air from consumer and commercial products (or any combination thereof) in order to-

(i) determine their potential to contribute to ozone levels which violate the national ambient air quality standard for ozone; and

(ii) establish criteria for regulating consumer and commercial products or classes or categories thereof which shall be subject to control under this subsection.

The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990.

(B) Consideration of certain factors

In establishing the criteria under subparagraph (A)(ii), the Administrator shall take into consideration each of the following:

(i) The uses, benefits, and commercial demand of consumer and commercial products.

(ii) The health or safety functions (if any) served by such consumer and commercial products.

(iii) Those consumer and commercial products which emit highly reactive volatile organic compounds into the ambient air.

(iv) Those consumer and commercial products which are subject to the most cost-effective controls.

(v) The availability of alternatives (if any) to such consumer and commercial products which are of comparable costs, considering health, safety, and environmental impacts.

(3) Regulations to require emission reductions

(A) In general

Upon submission of the final report under paragraph (2), the Administrator shall list those categories of consumer or commercial products that the Administrator determines, based on the study, account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone. Credit toward the 80 percent emissions calculation shall be given for emission reductions from consumer or commercial products made after November 15, 1990. At such time, the Administrator shall divide the list into 4 groups establishing priorities for regulation based on the criteria established in paragraph (2). Every 2 years after promulgating such list, the Administrator shall regulate one group of categories until all 4 groups are regulated. The regulations shall require best available controls as defined in this section. Such regulations may exempt health use products for which the Administrator determines there is no suitable substitute. In order to carry out this section, the Administrator may, by regulation, control or prohibit any activity, including the manufacture or introduction into commerce, offering for sale, or sale of any consumer or commercial product which results in emission of volatile organic compounds into the ambient air.

(B) Regulated entities

Regulations under this subsection may be imposed only with respect to regulated entities.

(C) Use of CTGS

For any consumer or commercial product the Administrator may issue control techniques guidelines under this chapter in lieu of regulations required under subparagraph (A) if the Administrator determines that such guidance will be substantially as effective as regulations in reducing emissions of volatile organic compounds which contribute to ozone levels in areas which violate the national ambient air quality standard for ozone.

(4) Systems of regulation

The regulations under this subsection may include any system or systems of regulation as the Administrator may deem appropriate, including requirements for registration and labeling, self-monitoring and reporting, prohibitions, limitations, or economic incentives (including marketable permits and auctions of emissions rights) concerning the manufacture, processing, distribution, use, consumption, or disposal of the product.

(5) Special fund

Any amounts collected by the Administrator under such regulations shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available until expended, subject to annual appropriation Acts, solely to carry out the activities of the Administrator for which such fees, charges, or collections are

established or made.

(6) Enforcement

Any regulation established under this subsection shall be treated, for purposes of enforcement of this chapter, as a standard under section 7411 of this title and any violation of such regulation shall be treated as a violation of a requirement of section 7411(e) of this title.

(7) State administration

Each State may develop and submit to the Administrator a procedure under State law for implementing and enforcing regulations promulgated under this subsection. If the Administrator finds the State procedure is adequate, the Administrator shall approve such procedure. Nothing in this paragraph shall prohibit the Administrator from enforcing any applicable regulations under this subsection.

(8) Size, etc.

No regulations regarding the size, shape, or labeling of a product may be promulgated, unless the Administrator determines such regulations to be useful in meeting any national ambient air quality standard.

(9) State consultation

Any State which proposes regulations other than those adopted under this subsection shall consult with the Administrator regarding whether any other State or local subdivision has promulgated or is promulgating regulations on any products covered under this part. The Administrator shall

establish a clearinghouse of information, studies, and regulations proposed and promulgated regarding products covered under this subsection and disseminate such information collected as requested by State or local subdivisions.

(f) Tank vessel standards

(1) Schedule for standards

(A) Within 2 years after November 15, 1990, the Administrator, in consultation with the Secretary of the Department in which the Coast Guard is operating, shall promulgate standards applicable to the emission of VOCs and any other air pollutant from loading and unloading of tank vessels (as that term is defined in section 2101 of title 46) which the Administrator finds causes, or contributes to, air pollution that may be reasonably anticipated to endanger public health or welfare. Such standards shall require the application of reasonably available control technology, considering costs, any nonair-quality benefits, environmental impacts, energy requirements and safety factors associated with alternative control techniques. To the extent practicable such standards shall apply to loading and unloading facilities and not to tank vessels.

(B) Any regulation prescribed under this subsection (and any revision thereof) shall take effect after such period as the Administrator finds (after consultation with the Secretary of the department in which the Coast Guard is operating) necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period, except that the effective date shall not be more than 2 years after

promulgation of such regulations.

(2) Regulations on equipment safety

Within 6 months after November 15, 1990, the Secretary of the Department in which the Coast Guard is operating shall issue regulations to ensure the safety of the equipment and operations which are to control emissions from the loading and unloading of tank vessels, under section 3703 of title 46 and section 1225 of title 33. The standards promulgated by the Administrator under paragraph (1) and the regulations issued by a State or political subdivision regarding emissions from the loading and unloading of tank vessels shall be consistent with the regulations regarding safety of the Department in which the Coast Guard is operating.

(3) Agency authority

(A) The Administrator shall ensure compliance with the tank vessel emission standards prescribed under paragraph (1)(A). The Secretary of the Department in which the Coast Guard is operating shall also ensure compliance with the tank vessel standards prescribed under paragraph (1)(A).

(B) The Secretary of the Department in which the Coast Guard is operating shall ensure compliance with the regulations issued under paragraph (2).

(4) State or local standards

After the Administrator promulgates standards under this section, no State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions from

tank vessels subject to regulation under paragraph (1) unless such standard is no less stringent than the standards promulgated under paragraph (1).

(5) Enforcement

Any standard established under paragraph (1)(A) shall be treated, for purposes of enforcement of this chapter, as a standard under section 7411 of this title and any violation of such standard shall be treated as a violation of a requirement of section 7411(e) of this title.

(g) Ozone design value study

The Administrator shall conduct a study of whether the methodology in use by the Environmental Protection Agency as of November 15, 1990, for establishing a design value for ozone provides a reasonable indicator of the ozone air quality of ozone nonattainment areas. The Administrator shall obtain input from States, local subdivisions thereof, and others. The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990. The results of the study shall be subject to peer and public review before submitting it to Congress.

§ 7511c. Control of interstate ozone air pollution

(a) Ozone transport regions

A single transport region for ozone (within the meaning of section 7506a(a) of this title), comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan

Statistical Area that includes the District of Columbia, is hereby established by operation of law. The provisions of section 7506a(a)(1) and (2) of this title shall apply with respect to the transport region established under this section and any other transport region established for ozone, except to the extent inconsistent with the provisions of this section. The Administrator shall convene the commission required (under section 7506a(b) of this title) as a result of the establishment of such region within 6 months of November 15, 1990.

(b) Plan provisions for States in ozone transport regions

(1) In accordance with section 7410 of this title, not later than 2 years after November 15, 1990 (or 9 months after the subsequent inclusion of a State in a transport region established for ozone), each State included within a transport region established for ozone shall submit a State implementation plan or revision thereof to the Administrator which requires the following--

(A) that each area in such State that is in an ozone transport region, and that is a metropolitan statistical area or part thereof with a population of 100,000 or more comply with the provisions of section 7511a(c)(2)(A) of this title (pertaining to enhanced vehicle inspection and maintenance programs); and

(B) implementation of reasonably available control technology with respect to all sources of volatile organic compounds in the State covered by a control techniques guideline issued before or after November 15, 1990.

(2) Within 3 years after November 15, 1990, the Administrator shall complete a study identifying control

measures capable of achieving emission reductions comparable to those achievable through vehicle refueling controls contained in section 7511a(b)(3) of this title, and such measures or such vehicle refueling controls shall be implemented in accordance with the provisions of this section. Notwithstanding other deadlines in this section, the applicable implementation plan shall be revised to reflect such measures within 1 year of completion of the study. For purposes of this section any stationary source that emits or has the potential to emit at least 50 tons per year of volatile organic compounds shall be considered a major stationary source and subject to the requirements which would be applicable to major stationary sources if the area were classified as a Moderate nonattainment area.

(c) Additional control measures

(1) Recommendations

Upon petition of any State within a transport region established for ozone, and based on a majority vote of the Governors on the Commission (or their designees), the Commission may, after notice and opportunity for public comment, develop recommendations for additional control measures to be applied within all or a part of such transport region if the commission determines such measure are necessary to bring any area in such region into attainment by the dates provided by this subpart. The commission shall transmit such recommendations to the Administrator.

(2) Notice and review

Whenever the Administrator receives recommendations prepared by a commission pursuant to paragraph (1) (the date

of receipt of which shall hereinafter in this section be referred to as the "receipt date"), the Administrator shall-

(A) immediately publish in the Federal Register a notice stating that the recommendations are available and provide an opportunity for public hearing within 90 days beginning on the receipt date; and

(B) commence a review of the recommendations to determine whether the control measures in the recommendations are necessary to bring any area in such region into attainment by the dates provided by this subpart and are otherwise consistent with this chapter.

(3) Consultation

In undertaking the review required under paragraph (2)(B), the Administrator shall consult with members of the commission of the affected States and shall take into account the data, views, and comments received pursuant to paragraph (2)(A).

(4) Approval and disapproval

Within 9 months after the receipt date, the Administrator shall (A) determine whether to approve, disapprove, or partially disapprove and partially approve the recommendations; (B) notify the commission in writing of such approval, disapproval, or partial disapproval; and (C) publish such determination in the Federal Register. If the Administrator disapproves or partially disapproves the recommendations, the Administrator shall specify

(i) why any disapproved additional control

measures are not necessary to bring any area in such region into attainment by the dates provided by this subpart or are otherwise not consistent with the chapter; and

(ii) recommendations concerning equal or more effective actions that could be taken by the commission to conform the disapproved portion of the recommendations to the requirements of this section.

(5) Finding

Upon approval or partial approval of recommendations submitted by a commission, the Administrator shall issue to each State which is included in the transport region and to which a requirement of the approved plan applies, a finding under section 7410(k)(5) of this title that the implementation plan for such State is inadequate to meet the requirements of section 7410(a)(2)(D) of this title. Such finding shall require each such State to revise its implementation plan to include the approved additional control measures within one year after the finding is issued.

(d) Best available air quality monitoring and modeling

For purposes of this section, not later than 6 months after November 15, 1990, the Administrator shall promulgate criteria for purposes of determining the contribution of sources in one area to concentrations of ozone in another area which is a nonattainment area for ozone. Such criteria shall require that the best available air quality monitoring and modeling techniques be used for purposes of making such determinations.

§ 7511d. Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain

(a) General rule

Each implementation plan revision required under section 7511a(d) and (e) of this title (relating to the attainment plan for Severe and Extreme ozone nonattainment areas) shall provide that, if the area to which such plan revision applies has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date, each major stationary source of VOCs located in the area shall, except as otherwise provided under subsection (c) of this section, pay a fee to the State as a penalty for such failure, computed in accordance with subsection (b) of this section, for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone. Each such plan revision should include procedures for assessment and collection of such fees.

(b) Computation of fee

(1) Fee amount

The fee shall equal $5,000, adjusted in accordance with paragraph (3), per ton of VOC emitted by the source during the calendar year in excess of 80 percent of the baseline amount, computed under paragraph (2).

(2) Baseline amount

For purposes of this section, the baseline amount shall be computed, in accordance with such guidance as the

Administrator may provide, as the lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable implementation plan ("allowables")) during the attainment year. Notwithstanding the preceding sentence, the Administrator may issue guidance authorizing the baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year. Such guidance may provide that such average calculation for a specific source may be used if that source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

(3) Annual adjustment

The fee amount under paragraph (1) shall be adjusted annually, beginning in the year beginning after 1990, in accordance with section 7661a(b)(3)(B)(v) of this title (relating to inflation adjustment).

(c) Exception

Notwithstanding any provision of this section, no source shall be required to pay any fee under subsection (a) of this section with respect to emissions during any year that is treated as an Extension Year under section 7511(a)(5) of this title.

(d) Fee collection by Administrator

If the Administrator has found that the fee provisions of the implementation plan do not meet the requirements of this

section, or if the Administrator makes a finding that the State is not administering and enforcing the fee required under this section, the Administrator shall, in addition to any other action authorized under this subchapter, collect, in accordance with procedures promulgated by the Administrator, the unpaid fees required under subsection (a) of this section. If the Administrator makes such a finding under section 7509(a)(4) of this title, the Administrator may collect fees for periods before the determination, plus interest computed in accordance with section 6621(a)(2) of title 26 (relating to computation of interest on underpayment of Federal taxes), to the extent the Administrator finds such fees have not been paid to the State. The provisions of clauses (ii) through (iii) of section 7661a(b)(3)(C) of this title (relating to penalties and use of the funds, respectively) shall apply with respect to fees collected under this subsection.

(e) Exemptions for certain small areas

For areas with a total population under 200,000 which fail to attain the standard by the applicable attainment date, no sanction under this section or under any other provision of this chapter shall apply if the area can demonstrate, consistent with guidance issued by the Administrator, that attainment in the area is prevented because of ozone or ozone precursors transported from other areas. The prohibition applies only in cases in which the area has met all requirements and implemented all measures applicable to the area under this chapter.

§ 7511e. Transitional areas

If an area designated as an ozone nonattainment area as of November 15, 1990, has not violated the national primary

ambient air quality standard for ozone for the 36-month period commencing on January 1, 1987, and ending on December 31, 1989, the Administrator shall suspend the application of the requirements of this subpart to such area until December 31, 1991. By June 30, 1992, the Administrator shall determine by order, based on the area's design value as of the attainment date, whether the area attained such standard by December 31, 1991. If the Administrator determines that the area attained the standard, the Administrator shall require, as part of the order, the State to submit a maintenance plan for the area within 12 months of such determination. If the Administrator determines that the area failed to attain the standard, the Administrator shall, by June 30, 1992, designate the area as nonattainment under section 7407(d)(4) of this title.

§ 7511f. NO_x and VOC study

The Administrator, in conjunction with the National Academy of Sciences, shall conduct a study on the role of ozone precursors in tropospheric ozone formation and control. The study shall examine the roles of NO_x and VOC emission reductions, the extent to which NO_x. reductions may contribute (or be counterproductive) to achievement of attainment in different non-attainment areas, the sensitivity of ozone to the control of NO_x, the availability and extent of controls for NO_x, the role of biogenic VOC emissions, and the basic information required for air quality models. The study shall be completed and a proposed report made public for 30 days comment within I year of November 15, 1990, and a final report shall be submitted to Congress within 15 months after November 15, 1990. The Administrator shall utilize all available information and studies, as well as develop additional information, in conducting the study required by this section.

Excerpt from Section 307 of the Clean Air Act

§ 7607. Administrative Proceedings and Judicial Review

* * *

(b) Judicial Review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this tile (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter

(including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

Excerpt from The Transportation Equity Act for the 21st Century

Title VI--Ozone And Particulate Matter Standards

§ 6101. Findings And Purpose

(a) The Congress finds that--

(1) there is a lack of air quality monitoring data for fine particle levels, measured as PM2.5, in the United States and the States should receive full funding for the monitoring efforts;

(2) such data would provide a basis for designating areas as attainment or nonattainment for any PM2.5 national ambient air quality standards pursuant to the standards promulgated in July 1997;

(3) the President of the United States directed the Administrator of the Environmental Protection Agency (referred to in this title as the "Administrator") in a memorandum dated July 16, 1997, to complete the next periodic review of the particulate matter national ambient air quality standards by July 2002 in order to determine "whether to revise or maintain the standards";

(4) the Administrator has stated that 3 years of air quality monitoring data for fine particle levels, measured as PM2.5 and performed in accordance with any applicable Federal reference methods, is appropriate for designating areas as attainment or nonattainment pursuant to the July 1997 promulgated standards; and

(5) the Administrator has acknowledged that in drawing boundaries for attainment and nonattainment areas for the July 1997 ozone national air quality standards, Governors would benefit from considering implementation guidance from EPA on drawing area boundaries.

(b) The purposes of this title are--

(1) to ensure that 3 years of air quality monitoring data regarding fine particle levels are gathered for use in the determination of area attainment or nonattainment designations respecting any PM2.5 national ambient air quality standards;

(2) to ensure that the Governors have adequate time to consider implementation guidance from EPA on drawing area boundaries prior to submitting area designations respecting the July 1997 ozone national ambient air quality standards;

(3) to ensure that the schedule for implementation of the July 1997 revisions of the ambient air quality standards for particulate matter and the schedule for the Environmental Protection Agency's visibility regulations related to regional haze are consistent with the timetable for implementation of such particulate matter standards as set forth in the President's Implementation Memorandum dated July 16, 1997.

§ 6102. Particulate Matter Monitoring Program.

(a) Through grants under section 103 of the Clean Air Act the Administrator of the Environmental Protection Agency shall use appropriated funds no later than fiscal year 2000 to fund 100 percent of the cost of the establishment, purchase, operation and maintenance of a PM2.5 monitoring network necessary to implement the national ambient air quality

standards for PM2.5 under section 109 of the Clean Air Act. This implementation shall not result in a diversion or reprogramming of funds from other Federal, State or local Clean Air Act activities. Any funds previously diverted or reprogrammed from section 105 Clean Air Act grants for PM2.5 monitors must be restored to State or local air programs in fiscal year 1999.

(b) EPA and the States, consistent with their respective authorities under the Clean Air Act, shall ensure that the national network (designated in subsection (a)) which consists of the PM2.5 monitors necessary to implement the national ambient air quality standards is established by December 31, 1999.

(c)(1) The Governors shall be required to submit designations referred to in section 107(d)(1) of the Clean Air Act for each area following promulgation of the July 1997 PM2.5 national ambient air quality standard within 1 year after receipt of 3 years of air quality monitoring data performed in accordance with any applicable Federal reference methods for the relevant areas. Only data from the monitoring network designated in subsection (a) and other Federal reference method PM2.5 monitors shall be considered for such designations. Nothing in the previous sentence shall be construed as affecting the Governor's authority to designate an area initially as nonattainment, and the Administrator's authority to promulgate the designation of an area as nonattainment, under section 107(d)(1) of the Clean Air Act, based on its contribution to ambient air quality in a nearby nonattainment area.

(2) For any area designated as nonattainment for the July 1997 PM2.5 national ambient air quality standard in

accordance with the schedule set forth in this section, notwithstanding the time limit prescribed in paragraph (2) of section 169B(e) of the Clean Air Act, the Administrator shall require State implementation plan revisions referred to in such paragraph (2) to be submitted at the same time as State implementation plan revisions referred to in section 172 of the Clean Air Act implementing the revised national ambient air quality standard for fine particulate matter are required to be submitted. For any area designated as attainment or unclassifiable for such standard, the Administrator shall require the State implementation plan revisions referred to in such paragraph (2) to be submitted 1 year after the area has been so designated. The preceding provisions of this paragraph shall not preclude the implementation of the agreements and recommendations set forth in the Grand Canyon Visibility Transport Commission Report dated June 1996.

(d) The Administrator shall promulgate the designations referred to in section 107(d)(1) of the Clean Air Act for each area following promulgation of the July 1997 PM2.5 national ambient air quality standard by the earlier of 1 year after the initial designations required under subsection (c)(1) are required to be submitted or December 31, 2005.

(e) The Administrator shall conduct a field study of the ability of the PM2.5 Federal Reference Method to differentiate those particles that are larger than 2.5 micrograms in diameter. This study shall be completed and provided to the Committee on Commerce of the House of Representatives and the Committee on Environment and Public Works of the United States Senate no later than 2 years from the date of enactment of this Act.

APPENDIX B

Attachment to Presidential Memorandum, "Implementation Plan for Revised Air Quality Standards," 62 Fed. Reg. 38,421 (1997) (excerpts)

Memorandum of July 16, 1997; Implementation of Revised Air Quality Standards for Ozone and Particulate Matter
Memorandum for the Administrator of the Environmental Protection Agency

* * *

In order for the implementation of these standards to proceed in accordance with the goals I have established, I hereby direct you, in consultation with all affected agencies and parties, to undertake the steps appropriate under law to carry out the attached plan and to complete all necessary guidance and rulemaking no later than December 31, 1998.

* * *

/s/ William J. Clinton

* * *

Implementation Plan for Revised Air Quality Standards

* * *

Implementation of Ozone Standard

Phase-out of 1-hour standard

* * *

Subpart 2 of part D of Title I of the CAA addresses the requirements for different classifications of nonattainment areas that do not meet the current 1-hour standard (i.e., marginal, moderate, serious, and severe). These requirements include such items as mandatory control measures, annual rate of progress requirements for emission reductions, and offset ratios for the emissions from new or modified stationary sources. These requirements have contributed significantly to the improvements in air quality since 1990. Although the EPA initially offered an interpretation of the CAA in the proposed Interim Implementation Policy (IIP) (61 FR 65764, December 13, 1996) under which the provisions of Subpart 2 would not apply to existing ozone nonattainment areas once a new ozone NAAQS is promulgated, the EPA has reconsidered that interpretation after receiving comments on the proposed IIP. Based on EPA's legal review, the Agency has concluded that Subpart 2 should continue to apply as a matter of law for the purpose of achieving attainment of the current 1-hour standard. Once an area attains the 1-hour standard, those provisions will no longer apply and the area's implementation of the new 8-hour standard would be governed only by the provisions of Subpart 1 of Part D of Title I.

* * *

Implementation of New 8-hour Ozone standard

This section discusses the general timeline for implementing the 8-hour standard, the importance of regional approaches to address ozone and options for classifying and designating areas relative to the 8-hour ozone NAAQS.

General Timeline

Following promulgation of a revised NAAQS, the Clean Air Act provides up to 3 years for State governors to recommend and the EPA to designate areas according to their most recent air quality. In addition, States will have up to 3 years from designation to develop and submit State Implementation Plans (SIPs) to provide for attainment of the new standard.

* * *

Implementation of Particulate Matter Standards

As required under the Act, within the next 5 years the EPA will complete the next periodic review of the PM criteria and standards, including review by the CASAC. As with all NAAQS reviews, the purpose is to update the pertinent scientific and technical information and to determine whether it is appropriate to revise the standards in order to protect the public health with an adequate margin of safety or to protect the public welfare. Although the EPA has concluded that the current scientific knowledge provides a strong basis for the revised PM_{10} and new $PM_{2.5}$ standards, there remain scientific uncertainties associated with the health and environmental effects of PM and the means of reducing them.

The following steps discussed below and in Appendix 1, Interagency Research Program, will address these concerns. First, recognizing the importance of developing a better understanding of the effects of fine particles on human health, including their causes and mechanisms, as well as the species and sources of $PM_{2.5}$, the EPA will continue to sponsor research, particularly in these areas. Second, the Administrator of the EPA will promptly initiate a new review of the scientific criteria on the effects of airborne particles on human health and the environment. Within 90 days, the EPA

will develop and provide to CASAC a plan and proposed schedule for this review to assure that the review is completed within 5 years. The plan and schedule will be published in the *Federal Register*. Thus, by July 2002, the Agency will have determined, based on data available from its review, whether to revise or maintain the standards. This determination will have been made before any areas have been designated nonattainment under the $PM_{2.5}$ standards and before imposition of any new controls related to the $PM_{2.5}$ standards.

Implementation of New $PM_{2.5}$ NAAQS

As set forth in the EPA's final action regarding PM, the EPA is establishing a new indicator for fine particles (i.e., $PM_{2.5}$) and promulgating new $PM_{2.5}$ standards. Monitoring and planning will be required before control measures to address these standards would be required. Therefore, the first priority for implementing them is establishment of a comprehensive monitoring network to determine ambient fine particle concentrations across the country. The monitoring network will help the EPA and the States determine which areas do not meet the new air quality standards, what are the major sources of $PM_{2.5}$ in various regions, and what action is needed to clean up the air. The EPA and the States will consult with affected stakeholders on the design of the network and will then establish the network, which will consist of approximately 1,500 monitors. All monitors will provide for limited speciation, or analysis of the chemical composition, of the particles measured. At least 50 of the monitors will provide for a more comprehensive speciation of the particles. The EPA will work with states to deploy the $PM_{2.5}$ monitoring network. Based on the ambient monitoring data we have seen to date, these would generally not include agricultural areas.

The EPA will fund the cost of purchasing the monitors, as well as the cost of analyzing particles collected at the monitors to determine their chemical composition.

Because the EPA is establishing standards for a new indicator for PM (i.e., $PM_{2.5}$), it is critical to develop the best information possible before attainment and nonattainment designation decisions are made. Three calendar years of Federal reference method monitoring data will be used to determine whether areas meet or do not meet the $PM_{2.5}$ standards. Three years of data will be available from the earliest monitors in the spring of 2001, and 3 years of data will be available from all monitors in 2004. Following this monitoring schedule and allowing time for data analysis, Governors and the EPA will not be able to make the first determinations as to which areas should be designated nonattainment until at least 2002, 5 years from now. The Clean Air Act, however, requires that the EPA make designation determinations (i..e, attainment, nonattainment, or unclassifiable) within 2 to 3 years of revising a NAAQS. To fulfill this requirement, in 1999 the EPA will issue "unclassifiable" designations for $PM_{2.5}$. These designations will not trigger the planning or control requirements of part D of Title I of the Act.

When the EPA designates $PM_{2.5}$ nonattainment areas pursuant to the Governors' recommendations beginning in 2002, areas will be allowed 3 years to develop and submit to the EPA pollution control plans showing how they will meet the new standards. Areas will then have up to 10 years from their redesignation to nonattainment to attain the $PM_{2.5}$ standards with the possibility of two 1-year extensions.

* * *

APPENDIX C

"National Ambient Air Quality Standards for Ozone," 62 Fed. Reg. 38,856 (1997) (excerpts)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 50

[ADA-95-58; FRL-5725-3]

RIN-2060-AE57

National Ambient Air Quality Standards for Ozone

Agency: Environmental Protection Agency (EPA)

Action: Final rule.

* * *

In the proposal, EPA proposed that the revocation of the existing 1-hour O_3 standard be delayed for certain purposes until EPA had approved State Implementation Plans to implement the new 8-hour O_3 standard. EPA had proposed continuing the applicability of the 1-hour standard in this way in order to facilitate continuity in public health protection during the transition to a new standard. (See Memorandum from John S. Seitz to Mary D. Nichols, November 20, 1996; Docket No. A-95-58, item II-B-3.) Also, at the time of the proposal of the new O_3 standard, EPA had proposed an interpretation of the Act in the proposed Interim Implementation Policy (61 FR 65764, December 13, 1996)

under which the provisions of subpart 2 of part D of Title I of the Act would not apply to existing O_3 nonattainment areas once a new O_3 standard becomes effective.

In light of comments received regarding the interpretation proposed in the Interim Implementation Policy, EPA has reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard. As a consequence, the provisions of subpart 2, which govern implementation of the 1-hour O_3 standard in O_3 nonattainment areas, will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. Once an area attains that standard, however, the purpose of the provisions of subpart 2 will have been achieved and those provisions will no longer apply. However, the provisions of subpart 1 of part D of Title I of the Act would apply to the implementation of the new 8-hour O_3 standards.

To facilitate the implementation of those provisions and to ensure a smooth transition to the implementation of the new 8-hour standard, the 1-hour standard should remain applicable to areas that are not attaining the 1-hour standard. Therefore, the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard, at which point the 1-hour standard will no longer apply to that area.

* * *

D. 1990 Act Amendments

Contrary to the view expressed in some public comments, EPA maintains that the provisions of subpart 2 of Part D of Title I of the Clean Air Act, enacted in 1990, do not preclude EPA from revising the O_3 standard. The provisions of subpart 2 simply do not limit EPA's clear authority under section 109 to revise the standard.

The basic contention of the commenters is that because the provisions of subpart 2 are linked to the current 1-hour, 0.12 ppm O_3 standard, they prohibit EPA from revising the O_3 standard. These provisions, however, do not lead to such a conclusion. Moreover, the view expressed in these comments ignores provisions indicating that Congress believed that EPA could revise the O_3 NAAQS.

At the outset, it should be noted that Congress expressly authorized EPA to revise any ambient air quality standard in section 109. That section, which requires EPA to review and revise, as appropriate, each NAAQS every 5 years, contains no language expressly or implicitly prohibiting EPA from revising a NAAQS. If Congress had intended to preclude EPA from reviewing and revising a NAAQS, which is one of EPA's fundamental functions, Congress would have specifically done so. Clearly, Congress knew how to preclude EPA from exercising otherwise existing regulatory authority and did so in other instances. See section 202(b)(1)(C)(expressly precluding EPA from modifying certain motor vehicle standards prior to model year 2004); section 112(b)(2)(preventing EPA from adding to the list of hazardous air pollutants any air pollutants that are listed under section 108(a) unless they meet the specific exceptions of section 112(b)(2)); section 249(e)(3), (f) and section

250(b)(limiting EPA's authority regarding certain clean-fuel vehicle programs). No such language was included in either section 109 or elsewhere in the Act and no such implication may properly be based on the provisions of subpart 2 of Part D of Title I.

Second, other provisions of the Act expressly contemplate EPA's ability to revise any NAAQS, and provide no indication that such ability is limited to standards other than those whose implementation is the subject of subparts 2, 3 and 4 of Part D. For example, section 110(a)(2)(H)(i) provides that SIPs are to provide for revisions "from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard ***." Section 107(d)(1)(A) provides a process for designating areas as attainment, nonattainment, or unclassifiable "after promulgation of a new or revised standard for any pollutant under section 109 ***." Section 172(e) addresses modifications of national primary ambient air quality standards. Finally, section 172(a)(1) expressly contemplates that EPA may revise a standard in effect at the time of enactment of the 1990 Clean Air Act Amendments. Section 172(a)(1)(A) provides EPA with authority to classify nonattainment areas on or after the designation of an area as nonattainment with respect to "any revised standard, including a revision of any standard in effect on the date of the enactment of the Clean Air Act Amendments of 1990." Plainly, Congress had no intention of prohibiting EPA from revising any of the ambient standards in effect at the time of the enactment of the 1990 amendments.

Third, the provisions of subpart 2 of Part D do not support the contention that they somehow preclude EPA from exercising its authority to revise the NAAQS under section

109. The fact that Congress laid out an implementation program for the O_3 standard existing at the time of the 1990 amendments in no way suggests that Congress intended to preclude EPA from exercising the authority it provided EPA to revise the NAAQS when the health data on which EPA bases such decisions warranted a change in the standard. Contrary to this contention, section 181(a) does not preclude the designation of areas as nonattainment for O_3 that have design values less than 0.121 ppm. EPA has designated as nonattainment numerous areas whose design value was less than 0.121 ppm, but which violated the existing 1-hour, 0.12 ppm O_3 standard. These areas, referred to as "nonclassifiable nonattainment areas," include "submarginal" areas (i.e., O_3 nonattainment areas with design values below 0.121 ppm), (See 57 FR 13498, 13524-27, April 16, 1992). These areas include areas that were designated nonattainment prior to the 1990 amendments and whose nonattainment designation Congress required to be continued after 1990. See section 107(d)(1)(C)(i). Clearly, Congress did not prohibit the designation of areas as nonattainment for O_3 with design values below 0.121 ppm; in fact, in some cases, Congress required it. Furthermore, the position advanced by the commenters would mean that, in effect, Congress in the 1990 amendments legislatively revised the then-existing 1-hour, 0.12 ppm O_3 standard to a 0.121 ppm standard. There is no indication that Congress intended to do that.

In addition, the fact that Congress directed EPA to use "the interpretation methodology issued by the Administrator most recently" before the date of the enactment of the Clean Air Act Amendments of 1990 in the context of subpart 2 does not add any support to the commenters' position; it merely shows that Congress intended the existing 1-hour, 0.12 ppm

standard to be implemented in a specified way, not that Congress intended to preclude EPA from using its otherwise applicable authority to revise the standard.

The EPA also disagrees with the contention that sections 172(a)(1)(C) and (a)(2)(D), which provide that the general classification and attainment date provisions of section 172 do not apply to areas for which classifications or attainment dates "are specifically provided under other provisions of this part," support the conclusion that Congress intended to prohibit EPA from revising the O_3 standard. These provisions simply mean that where Congress elsewhere provided for specific classifications and attainment dates, as in the case of subpart 2 regarding the 1-hour, 0.12 ppm standard, EPA is not to modify those classifications or dates. The EPA is not purporting to do this. These provisions do not lead to the conclusion that because Congress established them for the O_3 standard in effect at the time of the 1990 amendments, Congress meant that EPA could not revise that standard in order to appropriately protect public health.

EPA does not accept the thesis that revising the O_3 standard forces EPA to violate other provisions of the Act and, therefore, is not an "appropriate" revision of the standard under section 109. Revising the O_3 standard in accordance with the language of section 109 does not result in EPA violating any provision of the Act. On the other hand, a determination by EPA that the O_3 standard should not be revised, even though EPA concludes that it needs to be revised to protect public health with an adequate margin of safety, would violate section 109.

Also, EPA does not believe that carrying out the provisions of section 109 to set a new O_3 standard to protect

public health with an adequate margin of safety somehow "risks undermining both perceptions and reality of the functioning of our democratic form of government." EPA is merely implementing the words of the Clean Air Act, a statute passed by the Congress and signed by the President. To refuse to revise the standard notwithstanding the need to protect public health as enunciated in section 109 would thwart the objectives of those who passed and signed the Clean Air Act on behalf of the American public.

Finally, for the reasons stated above, EPA's analysis of its ability to implement the revised O_3 standard under the provisions of subpart 1 of Part D of Title I does not support the view that Congress prohibited EPA from revising the standard. Congress clearly specific an approach to the implementation of the 1-hour, 0.12 ppm O_3 standard in the provisions of subpart 2 of Part D. EPA believes that the clear and express linkage of that approach to the 1-hour, 0.12 ppm standard indicates that it may implement a revised O_3 standard in accord with the general principles of subpart 1 of Part D, as informed by the no-backsliding principle embodied in section 172(e). That Congress directed specifically how EPA and the States should implement the 1-hour, 0.12 ppm O_3 standard does not carry with it the implication that Congress intended to prohibit EPA from exercising its otherwise clear and express authority to revise that standard in order to carry out one of its fundamental missions, the establishment of ambient air quality standards to protect public health with an ample margin of safety. If Congress had intended to prohibit EPA from exercising such a fundamental authority it would have clearly specified (as it did in other instances) that EPA could not do so.

The EPA also disagrees with the contention that a revised O_3 standard may not be implemented for so long as the current 1-hour, 0.12 ppm O_3 standard remains in effect. The fact that the provisions of subpart 2 of Part D are focused on the implementation of the current standard does not mean that, if a new or revised O_3 standard is promulgated pursuant to section 109, the new standard could not simultaneously be implemented under the provisions of section 110 and subpart 1 of Part D, which apply regardless of the criteria pollutant of concern. There is no language in sections 181 or 182 that precludes the implementation of a different standard under other authority; those provisions simply govern the implementation of the 1-hour, 0.12 ppm O_3 standard. EPA further notes that it has historically had more than one primary standard for criteria pollutants (e.g., annual and 24-hour PM_{10} and sulfur dioxide standards, and 8-hour and 1-hour CO standards) and believes that had Congress wanted to preclude EPA from implementing two primary O_3 standards simultaneously it would have expressly precluded EPA from doing so. Thus, EPA does not believe that it must repeal the 1-hour 0.12 ppm O_3 standard before it can promulgate and implement a new primary O_3 standard.

* * *

APPENDIX D

Brief of Respondent United States Environmental Protection Agency,
Environmental Defense Fund v. Browner
(D.C. Cir. No. 98-1363) (excerpt)

ORAL ARGUMENT SCHEDULED
FOR SEPTEMBER 7, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1363

ENVIRONMENTAL DEFENSE FUND, et al.,

Petitioners,

v.

CAROL M. BROWNER, et al.,

Respondent,

ON PETITION FOR REVIEW OF FINAL ACTION
OF THE U.S. ENVIRONMENTAL
PROTECTION AGENCY

FINAL BRIEF OF RESPONDENT
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* * *

Section 307(b) of the Act establishes a sixty-day period for seeking judicial review of agency rules. 42 U.S.C. § 7607(b). This Court has "repeatedly held that temporal limitations on judicial review are jurisdictional in nature." *National Mining Ass'n v. Department of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995); *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 911-12 (D.C. Cir. 1985). The time limits on petitions for review of agency rules reflect a deliberate congressional choice to impose finality on agency decisions, in order to conserve agency resources and provide guidance and stability to those affected by the agency action. *Eagle-Picher*, 795 F.2d at 911-12.

Petitioners' central claim in this case is that EPA's criterion for phasing out the one-hour ozone NAAQS is unlawful because it does not require redesignating "clean" nonattainment areas to attainment pursuant to section 107(d)(3)(E) of the Act, 42 U.S.C. § 7407(d)(3)(E)(iv), and therefore does not require States to submit plans for maintaining the one-hour NAAQS indefinitely after attainment. Pet.Br. 2, 21, 31-33, 42. [19] However, that issue was resolved by EPA's 1997 Rule. 40 C.F.R. § 50.9(b).

The 1997 Rule is clear on its face. The Rule states, without qualification, that the one-hour standard "will no longer apply" to an area once EPA determines that it has "air quality meeting the 1-hour standard." 40 C.F.R. § 50.9(b). Thus, "air quality meeting the 1-hour standard" is the only criterion for revocation. The Rule also specifically states that "[a]rea designations are codified in 40 CFR part 81," which includes the list of designations of areas for the one-hour ozone standard. *Id.* The inclusion of this reference provides notice that the designations for the one-hour standard in 40 C.F.R. part 81 would be affected by EPA's action. *Id.*

Petitioners attempt to draw an artificial distinction

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[19] Although they now challenge the removal of attainment or unclassifiable designations in summary fashion (Pet.Br. 2, 4), Petitioners did not object to the removal of attainment or unclassifiable designations in their comments, and therefore cannot do so here. *See* EDF Comments, JA 182-188; NRDC Comments, JA 189-194. *Linemaster Switch Corp. v. EPA*, 938 F. 2d 1299, 1308-09 (D.C. Cir. 1991). In any event, Petitioners' alleged injury - an asserted "gap" in PSD requirements for areas designated attainment or unclassifiable - is illusory. As discussed above, Petitioners read EPA's PSD regulations too narrowly. PSD will in fact continue to apply to such areas. *Supra* 21.

between the revocation of the one-hour standard (which they appear to concede was addressed in the 1997 Rule) and the allegedly "separate" decision to remove the associated *designations* for revocation areas in 40 C.F.R. part 81. Pet.Br. 30. However, designations are for a particular NAAQS and are linked to that NAAQS. *E.g.*, 42 U.S.C. § 7407(d)(1)(A)(i)-(ii) ("attainment" and "nonattainment" designations defined as meeting or not meeting a particular NAAQS); *see infra* 43-44.[20] In its implementation policy statement issued contemporaneously with the ozone NAAQS proposal, *supra* 13, EPA made clear that it viewed revocation of the one-hour standard as also revoking the associated designations: "the designations [for the one-hour standard] would remain in effect so long as the current 1-hour ozone NAAQS remains in effect," 61 Fed. Reg. at 65,754 -- and, by necessary implication, would not remain in effect thereafter.

As discussed above, EPA initially proposed an approach similar to the one Petitioners urge here, whereby the Agency would delay revocation of the one-hour standard (and thus the associated designations) until it made designations for the revised eight-hour standard. *Id.; see supra* 13. However, EPA changed that approach in light of its revised legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority. 62 Fed. Reg. at 38,873; *supra* 13-14. In this context, the decision to revoke the one-hour standard necessarily meant that EPA was also revoking the designations associated with it. Petitioners were active and highly sophisticated participants in both the NAAQS rulemaking and

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[20] Petitioners elsewhere assert (Pet.Br. 36, 38-39) that designations are linked to "the pollutant ozone," not to particular NAAQS. As demonstrated below, that argument is not supported by the statutory language and is plainly incorrect. *Infra* 43-45.

the discussions on implementation, and could not reasonably have understood otherwise.[21]

Further, if there were any room for doubt as to EPA's meaning, the Presidential Memorandum, issued contemporaneously with and referenced in the preamble to the 1997 Rule (at 62 Fed. Reg. 38,856) removed it. The Memorandum was explicit, stating that under the 1997 Rule States "will not have to provide maintenance plans for those areas that attain the [one]-hour standard." 62 Fed. Reg. at 38,424. Petitioners thus had clear notice that EPA was *not* requiring States to develop maintenance plans. Because maintenance plans are required only as a prerequisite for redesignation under section 107(d)(3)(E), Petitioners also had clear notice that EPA was not retaining the one-hour designations that would otherwise have made maintenance plans relevant.

Other participants in the NAAQS rulemaking understood the implications of EPA's interpretation and challenged aspects of it in the pending *ATA* litigation concerning the revised ozone NAAQS. Indeed, those arguments are premised on their recognition that the one-hour standard (and thus the programs associated with it) would *not* be revoked for an area until the standard was met, but then

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[21] EDF and NRDC submitted comments on the proposed ozone and particulate matter NAAQS revisions and on EPA's proposed implementation guidance. Further, EDF and NRDC were members of the Subcommittee for Ozone, Particulate Matter, and Regional Haze, part of the Clean Air Act Advisory Committee created pursuant to the Federal Advisory Committee Act. The Subcommittee's purpose was to develop and recommend to EPA strategies for the implementation of the ozone and particulate matter standards and the regional haze strategy, which EPA was then developing.

would be revoked. Specifically, in *ATA*, industry and State petitioners argued that the continued applicability of the one-hour standard and Subpart 2 prohibited EPA from revising the one-hour standard and associated designations *at all*, in part because EPA's action created an alleged "patchwork" of different control requirements associated with different standards.[22] Thus, the petitioners in *ATA* well recognized that the 1997 Rule removed all planning requirements for the one-hour standard for an area, once that standard was revoked.

Petitioners here were similarly on notice of the issues resolved by the 1997 Rule; indeed, they now challenge EPA's determination regarding the interplay between the pre-existing one-hour and the revised eight-hour standard from a different perspective. Having apparently made a decision not to raise those issues at that time, they cannot do so now. Further, even if Petitioners had some doubt,[23] their proper course would have been to file a protective petition for review and let the Court decide whether the case was properly brought. *See Eagle-Picher*, 759 F.2d at 914 (in the analogous ripeness context, ". . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being time-barred") (emphasis in original). As

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[22] *See American Trucking Ass'ns, Inc., et al. v. EPA,* No. 97-1441 and consolidated cases, Brief of Non-State Clean Air Act Petitioners and Intervenors 22-25, JA 211-215; Brief of Petitioner States 5-9 & n.4, JA 217-221; Reply Brief of Petitioner States 8-10, JA 223-225.

[23] Petitioners do not address the timeliness issue in their brief. At most, they hint obliquely that the Revocation Rule was the first time they understood that EPA was removing designations associated with the one-hour standard, and was not requiring areas previously designated nonattainment to prepare maintenance plans for the one-hour standard. Pet. Br. 28, 43-44. As demonstrated above, their asserted confusion is not credible.

Eagle-Picher instructs, *id.* at 912, the risk of guessing wrong should fall on Petitioners, not the Court, EPA, or the communities and States relying on EPA's rule.

* * *

Supreme Court, U.S.
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Nos. 99-1257, 99-1263, 99-1265, 99-1426, 99-1431, 99-1442

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF OF STATE RESPONDENTS IN SUPPORT OF ATA AND CAA INDUSTRY'S CONDITIONAL CROSS-PETITIONS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995) Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.....4

Appalachian Power Company, et al. and American Trucking Associations, Inc., et al. ("CAA Industry and ATA conditional cross-petitioners" or "conditional cross-petitioners") have submitted Conditional Cross-Petitions in this case, which arises from petitions for writ of certiorari to review *American Trucking Associations, Inc. v. U.S. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). The Conditional Cross-Petitions concern the scope of authority of the United States Environmental Protection Agency ("EPA" or "the Agency") to promulgate or revise a National Ambient Air Quality Standard ("NAAQS" or "standard") under the Clean Air Act ("CAA" or "the Act"). At issue in EPA's petition is whether the Act as construed by EPA creates an excessive delegation of rulemaking authority. The conditional cross-petitioners argue that, if the Court grants review to consider the delegation issue, the Court should also review the related question whether the statute has been properly construed to prevent EPA from considering the costs, as well as the benefits, of regulation.

Respondent States of Michigan and West Virginia oppose question one, and all three Respondent States oppose questions two and three of EPA's petition for certiorari. *See*, Respondent States' Brief in Opposition to Petitions for Certiorari. At the same time, however, Respondent States agree with conditional cross-petitioners' Conditional Cross-Petitions, urging this Court, if it grants certiorari on any of these questions, to also grant certiorari on the issue of whether EPA is authorized to consider factors other than health in setting or revising a standard under Section 109(b) of the Clean Air Act, 42 U.S.C. 7409(b); EPA App. 111a. [1]

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[1] Respondent States of Ohio, Michigan and West Virginia do not support the cross-petition of Citizens for Balanced Transport.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITIONS

The Clean Air Act provides that the only mechanism for review of ambient air standards is to petition in the District of Columbia Circuit. CAA §307(b)(1); 42 U.S.C. 7607(b)(1). Review by this Court is, therefore, the only procedure by which to correct a long-standing erroneous decision by the District of Columbia Circuit on EPA's consideration of costs in setting ambient standards under the Clean Air Act. In addition, a correct interpretation of EPA's authority under the Act will avoid altogether the need to reach the nondelegation issue in the first question presented of EPA's petition.

The case below represents the latest in a line of cases from the D.C. Circuit, following *Lead Industries Ass'n. v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)("*Lead Industries*"), and holding that the EPA is bereft of discretion to consider the social, economic and environmental costs of, as well as the public health benefits of, a standard under Section 109. *Lead Industries* was wrongly decided, primarily because the language of Section 109 and related sections indicates that EPA has the authority to consider factors other than health when setting an air standard. Under Section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such *criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b)(1); EPA App. 111a (emphasis supplied). The word "criteria" refers to Section 108; Section 108(a) includes a non-exclusive list of factors for setting criteria, and Section 108(b) requires EPA to collect information on cost and technological feasibility simultaneously with establishing a standard. In addition, Congress's direction in Section 109(d)(1) that EPA revise standards "as may be appropriate" in accordance with

Section 109(b) and Section 108, gives EPA discretion to consider factors such as costs. Finally, Section 109(d)(2)(c) requires an "independent scientific review committee" to advise the Administrator of any "adverse public health, welfare, social, economic or energy effects" that may result from revision of a standard. *Lead Industries* and its progeny were, therefore, wrongly decided.

In fact, the *Lead Industries* line of cases, including the case below, seemingly contradicts other cases from the District of Columbia Circuit interpreting other, similar provisions of the Act, as well as other administrative decisions. *See Michigan Department of Environmental Quality v. U.S. EPA*, 2000 U.S. App. LEXIS 3209 (D.C. Cir. 2000) ("*NOx SIP call*"); *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). This Court can correct that conflict.

But perhaps most important to the Respondent States, this Court must overrule the D.C. Circuit's erroneous holding because its (and EPA's) interpretation of Section 109 potentially puts the States into an impossible box. Sections 108 and 110 of the Act, under recent D.C. Circuit decisions, *require* the States to consider economic and technological feasibility when implementing a standard for non-threshold pollutants, but the lower court's interpretation of Section 109 in this case *precludes* EPA from doing so. 175 F.3d at 1041; EPA App. 20a-21a. This interpretation creates a potential impasse between EPA and the States in implementing an air standard. The EPA, armed with complete discretion over a non-threshold pollutant and unable to consider economic or technological feasibility, could set a standard that its own data might demonstrate is realistically impossible for the States to achieve when cost and available technology are considered.

In order to resolve this impasse, if the Court grants certiorari in one or more of the petitions submitted in this case, it should also grant certiorari to the Conditional Cross-Petitions of the CAA Industry and ATA conditional cross-petitioners. In addition, the proper interpretation of Section 109 will preclude consideration of the delegation issue.

A. The Court Should Avoid Consideration Of The Non-Delegation Issue By Resolving The Statutory Cost-Benefit Issue.

As this Court has made clear on numerous occasions, it is the "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring). This case presents just such a situation. As demonstrated below, if the Court grants certiorari on the first question presented in EPA's petition, it should resolve the case by granting and resolving the issue presented in the Conditional Cross-Petitions, and avoiding the constitutional nondelegation issue presented by EPA.

The lower court correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone.[2] 175 F.3d at 1034; EPA App. 5a. It therefore correctly remanded the revised standard to the EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038; EPA App. 14a. However, in

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[2] The Respondent States focus here on the ozone standard. However, most of the statements made for ozone apply equally to the standard for coarse and fine particulate matter ($PM_{2.5}$ and PM_{10}). *See, e.g.*, 62 *Fed. Reg.* at 38,688 (July 18, 1997) (PM); 62 *Fed. Reg.* at 38,883 (July 18, 1997) (ozone); Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.

so doing, it was constrained by *Lead Industries* to deny EPA the one tool that would most help the Agency in selecting an ozone standard: cost-benefit analysis.

Ozone is a "non-threshold" pollutant; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no or few health effects are known. As the lower court stated, "EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e. ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034 (EPA App. 5a), citing Ozone Final Rule, 62 *Fed. Reg.* at 38,863/3 (July 18, 1997). *See also Vinyl Chloride*, 824 F.2d at 1148 (a "non-threshold" pollutant is one which "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the air standard for lead). The court below also noted that "the only concentration for ozone . . . that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034; EPA App. 6a.

In the absence of a health threshold for a pollutant, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant presents some threat to health. As the lower court stated, all the relevant variables related to health with regard to ozone "seem to range continuously from high to low." 175 F.3d at 1039; EPA App. 16a. Despite this acknowledgment, the lower court insists that EPA should be able to develop some health-based principle by which a standard can be developed. 175 F.3d at 1039; EPA App. 16a. And, also despite this acknowledgment, the lower court insists on its interpretation of Section 109(b), first articulated in *Lead Industries*, that EPA is barred from considering any factor other than health. 175 F.3d at 1038; EPA App. 14a-15a.

Ironically, the model suggested by the D.C. Circuit for EPA's use in "building blocks for a principled structure" is the Oregon plan for health care for the poor. This plan involves a ranking of treatments by a measure of the amount of improvement in health *divided by the cost of the treatment.* 175 F.3d at 1039; EPA App. 16a-17a. In other words, the principal model suggested by the lower court for EPA to follow in developing an "intelligible principle" for the ozone standard is itself a cost-benefit analysis.

Another alternative suggested by the lower court is for EPA to "report to Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *Id.*; EPA App. 18a. And indeed, if *Lead Industries* is correct, returning to Congress may be EPA's only legal alternative.

The interpretation of Section 109(b) of the Act suggested by EPA and supported by the lower court logically requires only one of two equally untenable results. The first is that EPA has no discretion and must set the standard for a non-threshold pollutant at zero. The second is that because no factor other than direct health effects can be considered, EPA has complete discretion to select any standard for a non-threshold pollutant. 175 F.3d at 1038; EPA App. 14a.

The first possible result of the lower court's interpretation of Section 109 for a non-threshold pollutant is both untenable and inconsistent with Congress's intent. If health is truly the only factor to be considered, then the only way to prevent any risk of direct adverse health effects is to set the standard at zero. "Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F. 3d at 1034; EPA App. 5a.

Of course, consideration of health as a criterion does not necessarily mean that the concentration chosen should be "utterly risk free." But "for EPA to pick any non-zero level it must explain the degree of imperfection permitted." 175 F.3d at 1034; EPA App. 6a. All of EPA's stated criteria are vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35; EPA App. 6a-7a, citing Ozone Final Rule, 62 *Fed. Reg.* at 38,883/2.

Aside from their vagueness, these factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health." How many deaths or adverse affects in the "sensitive population" is EPA willing to tolerate in the name of "public health"? How severe must a "health effect" be for EPA to consider it in setting a NAAQS designed to protect the "public health"? If direct health risks alone are to be considered, there simply is no principled way to draw a line, below which the effects are acceptable from a "public health" standpoint, and above which they are not. As a consequence, if factors other than direct health effects may not be considered, it is impossible to articulate or discern an intelligible principle for establishing a standard, at any level other than zero, for a non-threshold pollutant.

EPA's NAAQS determinations, as with all agency determinations, are subject to judicial review under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). CAA §307(b)(1), (d)(1), (s); 42 U.S.C. 7607(b)(1), (d)(1), (s); EPA App. 120a-21a. Under a non-zero-risk regime with direct health risk as the only criterion, EPA must pull a number out of thin air in setting a standard for ozone. As there is complete discretion in setting a standard under this theory, it is impossible for EPA to commit an abuse of discretion. This renders the standard

essentially unreviewable by the courts. Although the *Chevron* analysis is deferential to administrative agencies, it does not allow the agency complete and unreviewable discretion in its interpretation of acts of Congress.

The dilemma produced by *Lead Industries* and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine. As the ATA conditional cross-petitioners pointed out, the D.C. Circuit was bound by the *Lead Industries* precedent to preclude EPA's consideration of cost under Section 109, and the only alternative is permitting EPA a boundless (and therefore unconstitutional) discretion. This Court is not bound by *Lead Industries*, and can resolve the case without reaching the nondelegation doctrine, by construing Section 109 to permit consideration of other factors.

B. This Court Should Resolve The Impasse Created For EPA And The States By The District of Columbia Circuit's Holding That EPA Cannot Consider Costs When Setting A NAAQS.

The lower court's decision also places the States in a potentially impossible position. Under the Act, after EPA sets a standard for a particular pollutant, each State is required to develop a state implementation plan ("SIP") for that pollutant. CAA §110; 42 U.S.C. 7410. Indeed, the State is primarily responsible for enforcing a standard. CAA §107; 42 U.S.C. 7407. EPA is required to gather and issue to the States:

> information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology.

CAA §108(b); 42 U.S.C. 7408(b). In other words, EPA is to gather and provide data to the States on the economic and technological costs of implementing the standard. The lower court has held that this provision of Section 108 does not require or allow EPA to consider costs and benefits in setting a standard. 175 F.3d at 1041; EPA App. 20a.

If this interpretation is correct, then EPA is free to set the standard for a particular pollutant without considering its cost and EPA could set a standard that in practical terms is impossible to implement because of its costs. The States would be left "holding the bag": required to attain the standard by a specific deadline through their implementation plans, while considering costs of implementation, but faced with an arbitrarily-set and non-cost-effective standard.

This Court's review is necessary to alleviate the potential for the States to be placed in an untenable position under this regime--a regime that forces States to impose controls to abate theoretical health risks without promoting the "public health" of its population.

C. This Court Should Reconcile The Conflicting Holdings By The District Of Columbia Circuit Regarding An Administrative Agency's Authority To Consider Factors Not Mentioned Explicitly In The Enabling Legislation.

Under Section 109(b) of the Act, the EPA is to set air standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b). Once a standard is set, the EPA must review it periodically, and revise it as appropriate under Sections 108 and 109(b).

The D.C. Circuit first considered the scope of EPA's authority with regard to the language of Section 109(b) in *Lead Industries*. In *Lead Industries*, the court reviewed the contention by petitioners in that case that the EPA was *required* by the language of the statute to consider economic and technological feasibility in setting air quality standards for lead. 647 F.2d 1148. However, the court went beyond what was necessary to decide that issue, and held that not only was EPA not *required* to consider economic and technological factors, but that it was *precluded* from doing so. 647 F.2d 1148.

The erroneous dictum has been cited on several occasions since *Lead Industries*, and indeed expanded since *Lead Industries*, to preclude EPA from using a number of factors in determining a standard. For instance, the D.C. Circuit held that in setting the standard for particulate matter, the EPA was precluded from considering the health consequences of unemployment. *National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990). In addition, the D.C. Circuit held that EPA could not consider attainability and cost justifications for ozone standards. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981). And in dicta, the D.C. Circuit stated that §109 does "not allow consideration of technological or economic feasibility." *Vinyl Chloride*, 824 F.2d at 1158-59.

The *Lead Industries* rationale was that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency was forbidden from considering it. 647 F.2d at 1148. To be sure, the courts have correctly held that where statutory language articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. For example, in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), the Court found that a provision enumerating

eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. Similarly, in *American Petroleum Institute v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995), the lower court struck down EPA's decision to include the goal of ethanol market protection in its promulgation of regulations under Section 211 of the Clean Air Act, 42 U.S.C. 7545, a goal that could "possibly make air quality worse." According to the court, considering this goal as the basis for the regulation did not square with the statutory mandate to adopt performance standards that reduce pollution. And in *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), the D.C. Circuit held that EPA's decision to deny a waiver based on health considerations (rather than the statutorily-required criterion of whether an additive caused or contributed to the failure of an emission control device) was impermissible. *See also NOx SIP call*, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

In contrast, broad statutory language directing EPA to adopt rules that protect the "public health" with an "adequate margin of safety," and directing EPA to revise standards as may be "appropriate," does not preclude consideration of any factor. Thus, another line of D.C. Circuit cases holds that an agency can consider costs if not expressly precluded from doing so by statutory language. For instance, in *Vinyl Chloride*, 824 F.2d at 1155, 1163, the D.C. Circuit held that Section 112, 42 U.S.C. 7412, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health, did not preclude a consideration of costs. And in *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998), the D.C. Circuit allowed EPA to consider the effects of a proposed rule on the price and supply of gasoline because there was nothing in the text or structure of the statute to preclude it. In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), the FAA was permitted to consider costs in its plan for

"substantial restoration of the natural quiet," even though costs were not mentioned in the statute. And in *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991), the D.C. Circuit allowed EPA to use a cost-benefit analysis in determining whether fugitive dust from coal mines should count in identifying "major" contributors to "significant deterioration" under Sections 160 *et seq.*, despite the lack of statutory language mentioning costs. As the D.C. Circuit observed only this month in *NOx SIP call*, 2000 U.S. App. LEXIS 3209 at *36-40, "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction."[3]

Therefore, in contradiction to the rationale in the *Lead Industries* line of cases, the rationale in *Vinyl Chloride* and similar cases is that where Congress does not enact statutory language that precludes it, and where Congress in fact enacts statutory language (*e.g.*, "ample margin of safety") that opens the door to cost considerations, an administrative agency can consider cost. And where an agency is confronted with cost arguments, and it has discretion to consider them, it cannot lawfully ignore them. Indeed, there is no principled reason why Section 109(b) cannot be analyzed under *Vinyl Chloride* and similar cases, rather than under the erroneous *Lead Industries* test. Several of the cited cases involve similar statutory structures: "a mandate directed to some environmental benefit," "phrased in general quantitative terms," "and contain[ing] not a word alluding to non-health trade-offs." Section 109 fits comfortably into this structure. The language at issue in Section 109 is as follows:

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[3] Respondent States were among those who challenged EPA's *NOx SIP call* rule by asserting, among other claims, that costs were inappropriately considered in the determination of significant contribution.

> National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety*, are requisite to protect the public health.

42 U.S.C. 7409(b)(1)(emphasis added); EPA App. 111a. The examples of mandates "phrased in general quantitative terms" given by the court in *NOx SIP call* include "ample margin of safety," "substantial restoration" and "major." The mandate in Section 109(b), "an adequate margin of safety," is virtually identical to "ample margin of safety" cited by the D.C. Circuit in *NOx SIP call* and analyzed by that court in *Vinyl Chloride*. Like *Vinyl Chloride* and similar cases, Section 109(b) itself does not, on its face, preclude consideration of factors other than health. Therefore, under the rationale of *Vinyl Chloride* and similar cases, Section 109(b) allows EPA to consider cost in setting a standard, because Congress has not expressly forbidden it, while under the rationale of *Lead Industries* and progeny, Section 109(b) precludes EPA from considering cost in setting a standard because Congress does not expressly allow it.

Lead Industries simply cannot be reconciled with the *Vinyl Chloride* line of cases regarding the authority of an administrative agency to consider a factor not expressly mentioned in the statutory language. Given the D.C. Circuit's reluctance to overturn *Lead Industries*, or otherwise reconcile its own jurisprudence, and the potential for avoiding the nondelegation issue, this conflict should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Conditional Cross-Petitions if it grants certiorari on any form of the first question presented in EPA's petition.

Respectfully submitted,

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In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF IN RESPONSE FOR STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency (EPA or the Agency) revised National Ambient Air Quality Standards (NAAQS) promulgated under Section 109 of the Clean Air Act, 42 U.S.C. 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the lower court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act, which rule resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation.

3. Whether the lower court erred in its unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of national ozone standards.

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STATEMENT OF THE CASE

Respondent States of Ohio, Michigan, and West Virginia submit this brief in response to the petitions by the United States Environmental Protection Agency (EPA or the Agency) and other parties for a writ of certiorari to review the decision of the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999), EPA App. at 1a. The case before the lower court arose from an EPA rulemaking regarding two pollutants regulated under the Clean Air Act – particulate matter (PM) and ozone. The Respondent States support the Statement of the Case presented in the response briefs filed by the American Trucking Associations, Inc., *et al.* (collectively, ATA) and the Appalachian Power Company, *et al.* (collectively, the CAA Industry Respondents), which discuss both PM and ozone. In this response, the Respondent States focus on just one aspect of the rulemaking – ozone.

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the Act, cited as CAA), applied an identical statutory program for six specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies to meet each standard. Each implementation plan had to provide for "attainment" of the national standard within five years, with the possibility of a five-year extension, from the time of the 1977 amendments.

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States reach attainment of each standard by a date certain – had

failed with regard to ozone. In the face of this failure, Congress established a new approach and a unique program for ozone. In Subpart 2 of Part D of the amended Act, 42 U.S.C. 7511-7511f (CAA Indus. App. at 2a-64a), Congress created an elaborate, 20-year plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour standard, which Congress codified in Subpart 2.

On July 18, 1997, EPA changed Congress's plan for ozone attainment. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm.[1] The Respondent States petitioned the District of Columbia Circuit to review that revision. On May 14, 1999, the D.C. Circuit remanded the revised standards for PM and ozone to EPA for further rulemaking. As to Subpart 2 and Congress's plan for regulating ozone, the lower court rejected EPA's conclusion that the Agency had the authority to rewrite the congressional plan. The court relied on Congress's directive that Subpart 2 must apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the Act. 175 F.3d at 1048; EPA App. at 38a. On this basis, the court held that EPA could enforce a revised ozone standard only "under Subpart 2," 175 F.3d at 1050; EPA App. at 43a, and that the Act precluded EPA "from requiring areas to comply either more quickly or with a more stringent NAAQS." 175 F.3d at 1049; EPA App. at 40a.

EPA's rulemaking and the questions it raises are of substantial importance to the States. However, as described

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[1] The response briefs of ATA and the CAA Industry Respondents describe these limits in detail.

fully below, these questions arise here within the framework of well-established principles of judicial review and rules of statutory construction. The Court need not, therefore, revisit these principles in the context of this case.

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION

The States of Michigan and West Virginia adopt the reasoning of the CAA Industry Respondents and ATA for the purpose of denying review of Question One of EPA's petition of certiorari. That question asks whether the lower court properly remanded the revised rules to EPA in order for EPA to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the lower court properly construed the scope of the Agency's discretion in defining those criteria. The State of Ohio does not oppose the Court's grant of certiorari on the "delegation" question.

If, however, the Court grants review of the delegation question, all three Respondent States urge the Court to reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents. In particular, as explained in the Brief of Respondent States in Support of the ATA and CAA Industry Cross-Petitions, the Court may avoid the delegation question altogether if it finds that EPA may consider cost in any revision of a standard under Section 109 of the Act.

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION

Questions Two and Three of EPA's petition ask this Court to review the lower court's decision that EPA may only enforce any revised ozone standard in conformity with Subpart 2 of Part D of the Act. EPA App. at 81a. EPA first

asserts that the lower court did not have jurisdiction to review EPA's decision. EPA Pet. at 19-25. Alternatively, EPA presents to this Court the same arguments EPA made to the lower court on the merits of the question, *i.e.*, the same arguments the lower court rejected in its initial decision and on rehearing. EPA Pet. at 25-29. For the reasons detailed below, neither of these questions warrants additional review by this Court.

A. The Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.

In its petition for rehearing before the lower court, EPA argued for the first time that the Agency's decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether "the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. at 21. EPA bases this argument on two grounds: first, that the lower court's test for finality is "inconsistent with the test applied by this Court and other courts of appeals;" and, second, that the action is not ripe for review because it "deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS." EPA Pet. at 10.

EPA's arguments ignore the plain language of the Act, which explicitly permitted review in this case, misrepresent the lower court's express findings, which were based on well-established principles of judicial review, and contradict the position EPA took in the final rulemaking that gave rise to this case. It is unnecessary, therefore, for this Court to grant EPA's petition on this question and to revisit established precedent in the context of this case.

1. *The Clean Air Act expressly authorizes review of EPA's action.* Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1). That petition for review must be filed within 60 days of the Federal Register notice of the promulgation, and that action may not be judicially challenged thereafter. *Id.*

As EPA points out, Section 307, 42 U.S.C. 7607, also authorizes review of a number of final actions that are locally or regionally appealable in the local circuit court of appeals, including the Agency's approval or promulgation of a state implementation plan under Section 110 of the Act, 42 U.S.C. 7410. That additional authorization, however, in no way limits review, pursuant to Section 307, of EPA's promulgation of rules *at the time of promulgation.* Nor does the case here present a request, express or otherwise, to review "classification challenges." EPA Pet. at 20. Rather, it is a challenge to a final rule governing the manner in which States are to achieve attainment of national ozone standards, and, thus, a challenge specifically provided for under Section 307's scheme for prompt review of rules and standards *upon promulgation.*

Where, as here, the Act expressly provides for the review granted by the lower court, this Court need not grant certiorari to consider this question.

2. *The lower court's decision on finality is consistent with the test applied by this Court and other courts of appeals.* EPA has correctly noted that, in this Court's view, two conditions must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the

action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Contrary to EPA's suggestion, the lower court applied this well-established test and correctly determined that both elements are satisfied here.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38,873 (July 18, 1997)(emphasis in original). EPA explained that this "final decision" represented a change from its original intention to delay revocation of the 1-hour standard until after it had approved state plans for implementing the new standard. *Id.* EPA clarified that under this final decision "the provisions of subpart 2 . . . will continue to apply for so long as an area is not attaining the 1-

hour standard. Once an area attains that standard . . . the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards." *Id.* EPA then codified this decision in Section 50.9(b) of the final rule, from which the petitions below sought review. That section provides, "The 1-hour standard set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); Mass. and N.J. App. at 113.

There is nothing tentative about this final decision. As the lower court found, it is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." 195 F.3d at 8 (EPA App. at 78a), quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Second, as the lower court found, EPA's promulgation of a revised ozone NAAQS triggered a number of "obligations" and "legal consequences." As EPA acknowledged in the preamble to the final rule, the 8-hour standard becomes immediately effective to those areas designated "attainment" under the current standard.[2] Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). Under EPA's theory of the statute, this list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), to classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and to apply an attainment date, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), then by the States to implement a plan for meeting the revised

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[2] Reliance on preamble statements to explain final legislative rules is appropriate. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157-58 & n.13 (1982).

requirements, CAA §172(b); 42 U.S.C. 7502(b). EPA's suggestion that finality does not occur until after it designates areas and the States implement plans ignores the burden on the States that flows from EPA's theory of the statute as reflected in the final rule.

The lower court's recognition of the finality of EPA's decision and the immediate obligations that flow from it is consistent not only with this Court's review in *Bennett v. Spear*, but also with the analysis of such questions invariably applied by the lower court and other courts of appeals. *See, e.g., Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1196-1200 (10th Cir. 1999); *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998); *Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

In short, there is no disagreement between this Court and circuit courts, including the D.C. Circuit, as to the proper inquiries to determine finality, nor even among the parties in this case. EPA's real contention is that the lower court incorrectly applied the law to the facts before it – a contention unworthy of this Court's review.

3. *EPA's action is ripe for review.* In determining that EPA's action was ripe for review, the lower court applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9, EPA App. at 79a.

EPA's suggestion to this Court that it should have had more time to further develop its interpretation and to "work through the various implementation provisions" could apply to any rulemaking. *See* EPA Pet. at 25. EPA could always develop its original interpretation and, through various implementation efforts, change its approach. Where, as here, the question is one of law, judicial review need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Nor must judicial review await a more concrete injury to potential petitioners. Where, as here, "decisions to be made now or in the short future may be affected" by a court's decision, review is proper. *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974).

As with its decision on finality, the lower court applied well-established principles of jurisprudence to determine that the issues before it were fit for review and that delay would cause further hardship to the parties. It is unnecessary, therefore, for this Court to revisit these established principles in the context of this case.

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below.

As an alternative to its argument that the lower court lacked jurisdiction to review the Agency's action, EPA asserts that the lower court did not decide the merits of the case correctly. As with its decisions on finality and ripeness, however, the lower court decided the merits of the Subpart 2 implementation question within the framework of well-established principles of statutory construction. The lower

court determined that EPA's decision was contrary to Congress's intent, as expressed in the plain language of the 1990 amendments to the Clean Air Act. Re-argument of this question is, therefore, unworthy of review by this Court.

1. *The interlocutory nature of the lower court's decision counsels against granting certiorari on Question Three presented by EPA.* In their briefs in response to the petitions for certiorari, ATA and the CAA Industry Respondents have fully explained the interlocutory nature of the lower court's decision, which requires additional rulemaking. *See* CAA Industry Respondents Brief in Response at 29-30; ATA Brief in Response at 16-18. The Respondent States support the arguments presented in those briefs.

2. *The lower court correctly decided that EPA may only implement any revised ozone NAAQS in conformity with Subpart 2 of Part D of the Act.* In the case below, the Respondent States argued that Subpart 2 codified the one-hour, 0.12 ppm ozone standard and, therefore, only Congress can promulgate a revised standard for ozone. The Respondent States based their argument on the explicit language of Section 181(a), 42 U.S.C. 7511(a), which applies the Subpart 2 program "by operation of law" to "[e]ach area designated nonattainment for ozone" under Section 107(d) of the Act, 42 U.S.C. 7407(d). The lower court rejected that argument, finding that EPA has authority to revise the ozone standard and to designate areas as nonattainment under Subpart 1 of Part D, which applies to all other nonattainment areas.

The court agreed, however, that EPA does not have authority to implement a more stringent ozone standard in conflict with the Subpart 2 program, which Congress established as the exclusive program for implementing the ozone standard. On rehearing, the court confirmed that "EPA can enforce a revised primary ozone NAAQS only in

conformity with Subpart 2." 195 F.3d at 10, EPA App. at 81a. The court was correct in its analysis that, even if EPA retains the authority to revise the ozone NAAQS and to designate areas not meeting that standard as nonattainment, EPA may only implement that standard using the classifications and attainment dates set by Congress in Subpart 2.

The lower court based its findings, as with its finality and ripeness findings, upon straightforward statutory construction. As *Chevron* instructs, if Congress has spoken on the "precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has clearly spoken here.

Congress enacted Subpart 2 as a comprehensive scheme to address ozone nonattainment. Specifically, as EPA acknowledges, Congress enacted Subpart 2 because the existing controls imposed under Subpart 1, which applies to other nonattainment areas, had failed to bring areas into attainment with the one-hour, 0.12 ppm standard. *See* H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74. Rather than continue to treat all ozone nonattainment areas alike, Congress allowed the various areas between three and 20 years to attain the ozone standard, depending upon the extent of the area's ozone problem. *See id.* at 146-47. Congress provided additional measures that would apply in areas that failed to achieve attainment in 20 years, or that relapsed into nonattainment in the future.

The lower court held that the detailed and comprehensive nature of the Subpart 2 program manifests Congress's intent to require EPA to implement a revised ozone standard only in conformity with Subpart 2. Anything less would conflict with Congress's plan.

First, as noted above, Congress avoided the "one size fits all" approach of Subpart 1 and provided varying deadlines for attainment. In Subpart 2, Congress provided that if an area does not meet the standard on time, the area will "bump up" to the next classification, which includes a new attainment date. If an area does not achieve compliance by the final deadline for the most polluted category, sources within the area are then subject to fees for each ton of pollutant in excess of a baseline amount. In this way, Congress acknowledged that attainment was going to be extremely difficult, if not impossible, to achieve in some areas, and crafted a plan with strong incentives, specific programs, varying deadlines, and remedial measures for areas that failed to meet the applicable deadlines.

Second, Congress mandated specific controls for each category of nonattainment and directed EPA to impose certain requirements for reducing ozone. These specific requirements are a marked departure from the historic approach, which allowed States great latitude in determining what mix of controls is most appropriate to a certain region. Again, these specific requirements were included because Congress saw that the old model could not work for ozone. *See* I Legislative History of the Clean Air Act Amendments of 1990 at 1236 (statement of Rep. Fields)("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment areas which will in turn have to impose such requirements on industry in those areas").

Third, Congress created several mechanisms by which Subpart 2 was to control ozone attainment for the entire 20-year period and beyond. In conjunction with the bump-up provisions, in Section 182, 42 U.S.C. 7511a, Congress established reasonable further progress

requirements to ensure that States are, in fact, moving towards their goal. Congress also required areas that are "serious," "severe," or "extreme" nonattainment to include "contingency plans" with specific measures that would be implemented if an area does not meet a milestone. CAA §182(c)(9), (d), and (e); 42 U.S.C. 7511a(c)(9), (d), and (e). And Congress expressly mandated that Subpart 2 would continue to apply even if attainment were achieved. CAA §181(b); 42 U.S.C. 7511(b). As a whole, these provisions demonstrate that Congress anticipated that ensuring attainment and maintenance of the ozone NAAQS would be a continuing challenge and, more importantly, that Congress created a statutory structure within Subpart 2 to meet that challenge.

Because Congress has spoken to the "precise question" of ozone attainment under the Clean Air Act, the lower court was correct in its finding that, if EPA has the authority to revise the ozone NAAQS at all, then it may implement that standard only in conformity with Subpart 2. Any further re-argument of these issues within this straightforward statutory framework is unworthy of this Court's review.

3. *The lower court's decision restores certainty for the States.* The States of Massachusetts and New Jersey petition for certiorari on the merits of the Subpart 2 question, in part because the situation resulting from the lower court's decision "creates enormous uncertainty for the states as regulators." Mass. and N.J. Pet. at 29. On the contrary, the lower court's decision *restores* the certainty that existed prior to EPA's attempted interference with the program for ozone attainment that has been in place since 1990 — Congress's program under Subpart 2.

In fact, EPA's action would have created regulatory confusion in and among States because it created two

national standards instead of one. Many States, including both Michigan and Ohio, would have had different standards applicable in different parts of the State, as some portions of each would still be subject to the one-hour standard and some would not. *See* 62 Fed. Reg. 60,318, 60,323 (July 18, 1997); 63 Fed. Reg. 2,726, 2,762, 2,778 (January 16, 1998). The same would hold true among and between States, thus making the quantification of interstate pollution, the Petitioner States' primary concern, more difficult.

But, most fundamentally, implementation of a national ozone standard in a manner not in conformity with Subpart 2 would force the States to return to the failed compliance scheme that Congress abandoned when it created Subpart 2. Such a resurrection of the historic dilemma the States had in creating a plan to comply with an unachievable standard by a specific timeframe would not only create uncertainty, but would undoubtedly prove to be unsuccessful once again.

CONCLUSION

For these reasons, the Court should deny certiorari on Questions Two and Three presented by EPA. If the Court grants certiorari on Question One of EPA's petition, the "delegation" issue, then the Court should reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents.

Respectfully submitted,

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Environmental Protection Agency must base primary national ambient air quality standards solely on health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

American Lung Association (ALA) adopts the Rule 29.6 disclosure, and list of parties below, set forth in ALA's petition for certiorari at ii-v.

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CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

American Lung Association (ALA) adopts the citations to decisions entered, the basis for jurisdiction in this Court, and the constitutional provisions, statutes and regulations involved in this case set forth in ALA's petition for certiorari at 1-2.

STATEMENT OF THE CASE

ALA adopts the statement of the case set forth in ALA's petition for certiorari at 2-15. In addition, ALA notes that in the rulemakings at issue, the Environmental Protection Agency (EPA) rejected requests that the agency consider factors other than health effects relating to pollutants in the air. 62 Fed. Reg. 38683-88 (July 18, 1997); 62 Fed. Reg. 38878-83 (July 18, 1997). Specifically, EPA found that in setting primary national ambient air quality standards, the agency was statutorily barred by the Clean Air Act from considering such other factors. *Id.* The court below affirmed this aspect of EPA's decision under step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), basing its ruling on the plain meaning of the Act and on longstanding D.C. Circuit precedent. App. 17-20.[1] *Accord, id.* at 13.

[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263. In addition, for purposes of brevity, this response uses the phrase "non-health factors" to encompass all factors other than health effects relating to pollutants in the air.

ARGUMENT

The cross-petitions of American Trucking Associations (ATA) and Appalachian Power Company seek to reopen an issue that has been the subject of consistent interpretation by EPA for three decades and by the D.C. Circuit for two decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Specifically, cross-petitioners seek to reopen the long-standing conclusion of EPA and the D.C. Circuit that Clean Air Act § 109(b)(1) – which mandates national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety" – "bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). Cross-petitioners advance the curious assertion that by opening up this straightforward public health mandate to a plethora of other additional factors not specified in the statute, the extent of the congressional delegation can be *reduced*. The additional factors advocated by cross-petitioners are variously described as "overall impacts on society," Appalachian Power Cross-Pet. at 14, "economic or pragmatic factors," ATA Cross-Pet. at 22, "practical impacts," Appalachian Power Cross-Pet. at 15, "economic and social consequences," ATA Cross-Pet. at 23, or "broad economic, environmental, and indirect public health consequences." Appalachian Power Cross-Pet. at i. Moreover, cross-petitioners are apparently uncertain as to whether EPA's consideration of these factors is discretionary or mandatory. Their proposed cross-questions do not ask for a

determination that such consideration is mandatory,[2] and at least one of their cross-petitions advances the view that it is discretionary. Appalachian Power Cross-Pet. at 8 (the D.C. Circuit was "not unreasonable" in holding that EPA is not required to consider cost and feasibility; "a *requirement* to consider costs could allow costs to override public health") (emphasis in original). Elsewhere, however, they assert that EPA "must" consider non-health factors. Appalachian Power Cross-Pet. at 18; ATA Cross-Pet. at 22, 26. *Accord*, Ohio Rsp. to Cross-Pets. at 12.

The ATA and Appalachian Power cross-petitions should be denied. Cross-petitioners' argument that the Court can avoid the constitutional nondelegation question by adopting a statutory interpretation that greatly *increases* the scope of the congressional delegation is patently meritless. Moreover, under this Court's precedent, the constitutionality of the Act and EPA's interpretation can and should be upheld, regardless of how cross-petitioners' questions might be answered. Cross-petitioners do not even defend the D.C. Circuit's conclusion that the Clean Air Act is unconstitutional, and indeed ATA concedes that the Act "undisputedly" is constitutional. ATA Rsp. at 15. Cross-petitioners likewise do not explain how a constitutional statute can be made unconstitutional by an agency interpretation, and this Court's precedent establishes that it cannot.

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[2] The questions focus on whether EPA "must *ignore*" the non-health factors, ATA and Appalachian Power Cross-Pets., and Ohio Rsp. to Cross-Pets., at i (emphasis added), not on whether EPA must *consider* them.

Thus, far from contributing to this Court's resolution of the nondelegation question, the proposed cross-questions are irrelevant to – and a distraction from – that question. Cross-petitioners are simply seizing upon the lower court's incorrect nondelegation ruling as a means to obtain review of a question that was long ago decided – correctly – by EPA and the D.C. Circuit, and on which the Court has repeatedly denied certiorari.

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE.

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors.

In an attempt to obtain review of an issue unworthy of certiorari, cross-petitioners contend that the question whether Clean Air Act § 109(b)(1) permits EPA to consider non-health factors in setting primary NAAQS is "intertwined with" the nondelegation question. ATA Cross-Pet. at 7. *See also* Appalachian Power Cross-Pet. at 4. To the contrary, cross-petitioners' proposed issue addressing non-health factors is not implicated by the lower court's constitutional nondelegation ruling, and review of that statutory issue would in no way assist this Court's review of that ruling. Under this Court's nondelegation jurisprudence, the statutory provisions at

issue in this case, and EPA's interpretation of those provisions, are unquestionably constitutional, regardless of whether the statute requires that EPA consider only direct health impacts of air pollutants (as the lower court correctly held) or whether the agency may – or must – also consider other factors such as cost, socioeconomic factors, and indirect health impacts. Thus, to review the lower court's nondelegation ruling, the Court need not decide whether these other factors may or must be considered by EPA. We turn first to the constitutionality of the Act, and then to the constitutionality of EPA's interpretation of the Act.

Constitutionality of the Act. Cross-petitioners do not defend the lower court's holding that the Clean Air Act violates the nondelegation doctrine. *See* App. 12 (finding that "*statutory language* and an existing agency interpretation involve an unconstitutional delegation of power") (emphasis added); App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"). To the contrary, ATA acknowledges that the Act is "undisputedly" constitutional. ATA Rsp. at 15.

ALA agrees. To pass muster under the nondelegation doctrine, Congress need only specify an "intelligible principle" to guide agency implementation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This Congress has plainly done here, with the mandate for NAAQS that "protect the public health" with "an adequate margin of safety," and with ample additional guidance in the Act and legislative history. This Court has "upheld, . . . without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373. Indeed, contrary to the lower court's insistence on a "determinate criterion,"

App. 5, the Court has upheld statutes specifying thoroughly non-determinate criteria such as "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), "excessive profits," *Lichter v. United States*, 334 U.S. 742, 778-86 (1948), "just and reasonable" rates, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944), and even the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). As Justice Scalia put it: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting on other grounds, but agreeing with majority's conclusion that the statute at issue set forth an intelligible principle).

Indeed, this Court's precedent not only confirms ATA's concession that the Clean Air Act is "undisputedly" constitutional, but also establishes that the Act's constitutionality does not in any way depend on whether consideration of costs or other non-health factors is statutorily authorized or mandated. In *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490 (1981), concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the

phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine.* After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added).

As *American Textile* makes clear, this Court can resolve the nondelegation challenge to the Clean Air Act without reaching or deciding whether consideration of costs and other non-health factors is prohibited, allowed, or required.

Constitutionality of EPA's Interpretation of the Act. Moreover, consideration of the role of non-health factors is unnecessary to review of the constitutionality of EPA's interpretation of the Act. First, as stated above, the Court can and should rule – without resolving whether consideration of non-health factors is prohibited, allowed, or required – that the Act passes muster under the nondelegation doctrine. This "undisputed[ ]" constitutionality of the Act (ATA Rsp. at 15) necessarily entails the further conclusion that the lower court erred in requiring EPA to undertake a narrowing construction of the Act. A narrowing construction would only be appropriate if the Act "might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7. No party contends that the Act is or might be thought to be unconstitutional, and any such contention would be patently meritless under the Court's nondelegation precedent. Accordingly, no narrowing construction can possibly be required under the constitutional nondelegation doctrine, and the lower court's insistence on one was error. Because the premise of this conclusion (the undisputed constitutionality of the Act) does not depend in any way

on resolving what role non-health factors have in the setting of NAAQS, the conclusion itself does not require such resolution either.

Second, the core of the lower court's nondelegation ruling was the requirement that EPA specify a "determinate criterion for drawing lines." App. 5. This Court has held, however, that the Constitution does not require an agency to specify *any* rule of thumb to constrain its case-by-case determinations – much less a "determinate" rule of thumb:

> Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). Moreover, because the Court's nondelegation precedent has repeatedly upheld non-determinate standards set forth directly in *statutes*, p. 6, *supra*, there is in any event no constitutional basis for requiring agency *interpretations* to be determinate. Accordingly, regardless of whether the Clean Air Act prohibits, allows or mandates consideration of non-health factors, the lower court erred in ruling that the nondelegation doctrine requires EPA to prescribe a "determinate criterion" to govern the agency's decisionmaking.

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Non-delegation Issue.

Cross-petitioners also argue that the Court could avoid deciding the constitutional nondelegation issue by construing the Act to allow consideration of non-health factors. ATA Cross-Pet. at 22; Ohio Rsp. to Cross-Pet. at 2. This argument must be rejected for two reasons.

First, as shown above, the Court's precedent clearly establishes that the Clean Air Act passes constitutional muster under the nondelegation doctrine. There is no merit to cross-petitioners' request that the Court avoid that clear-cut issue – especially when the consequence of such avoidance would be to reach out and decide an issue that has been settled in the agency and the D.C. Circuit for decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Second, cross-petitioners err in asserting that their interpretation would, if adopted, avoid the constitutional issue. Cross-petitioners' argument necessarily rests on the assumption that *expanding* the statutorily cognizable factors beyond health would *narrow* the scope of the congressional delegation. The opposite is true: for reasons stated by then-Justice Rehnquist in *American Textile*, a health-only mandate involves a far narrower delegation than one that allows an agency to balance health against other factors. ALA Pet. at 19-20 (quoting then-Justice Rehnquist).

Indeed, under cross-petitioners' open-ended construction of the Act, *any* conceivable factor would be cognizable by EPA. ATA Cross-Pet. at 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original); Ohio Rsp. to Cross-Pets. at 11 (§ 109 "does not preclude consideration of *any* factor") (emphasis added). As these assertions make clear, if § 109(b)'s express reference to public health were to be construed as non-exclusive, there is no *statutorily* specified limit to the other factors EPA might be allowed to consider. As demonstrated by cross-petitioners' own multifarious descriptions of their proposed non-health factors, *see supra* at p. 2 (quoting cross-petitioners), reading such factors into the Act would result in a truly broad-ranging delegation. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (Rehnquist, J., dissenting, explains why he concluded that the Occupational Safety and Health Act represents an unconstitutionally excessive delegation: "If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

Remarkably, cross-petitioners' proposed interpretation actually would take the Court in a direction diametrically *opposite* to that followed in *Natl. Cable Television v. United States*, 415 U.S. 336 (1974), one of two cases cited in *Mistretta* as having adopted a narrowing interpretation to avoid a nondelegation issue. Construing a statute requiring fees to be "fair and equitable taking

into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts," id.* at 337, *Natl. Cable* concluded that the italicized factors should be disregarded. *Id.* at 342-43. As a result, "[t]he phrase 'value to the recipient' is . . . the measure of the authorized fee." *Id.* By contrast, the interpretation proposed by cross-petitioners here would *add* factors to the public health factor enumerated in the statute, thereby *broadening* the scope of the congressional delegation. Cross-petitioners' novel proposal to adopt a "widening" construction of the Act would not avoid the nondelegation issue, and should be rejected.

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI.

Twenty-nine years ago, only four months after enactment of the §§ 109 and 108 provisions governing NAAQS, EPA concluded that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (April 30, 1971). Since that time, the agency has not wavered from its initial interpretation. *See, e.g.*, 62 Fed. Reg. 38683-88 (July 18, 1997).

Moreover, two decades of jurisprudence by the D.C. Circuit has affirmed that (as stated by the court below) "§ 109(b) . . . bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). *See Lead Industries Ass'n*

v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990); *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (en banc) (*"Vinyl Chloride"*); *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Contrary to cross-petitioners' assertions that this caselaw has been superseded by *Chevron*, the D.C. Circuit has confirmed the exclusiveness of health factors in the NAAQS process repeatedly since *Chevron*. *NRDC v. Administrator; Vinyl Chloride; ALA v. EPA*. Moreover, *Lead Industries* itself, though pre-dating *Chevron*, was nonetheless decided "in Chevron step one terms." App. 18.

As cross-petitioners recognize, this Court has repeatedly denied certiorari on these decisions. ATA Cross-Pet. at 5. Moreover, these decisions are consistent with this Court's precedent. In *Union Electric Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976), a decision construing the Clean Air Act, the Court concluded: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Because Congress did not so provide in § 109(b)(1), EPA properly excluded those factors from consideration.

Likewise, the Court has recently held that the determination whether a product is "safe" within the meaning of the Food, Drug, and Cosmetic Act encompasses only whether "the *product itself* is safe," not whether regulation of the product could produce *indirect* adverse health effects. *FDA v. Brown & Williamson Tobacco Corp.*, U.S. Sup. Ct. No. 98-1152 (March 21, 2000), slip op. at 17

(emphasis in original). The Food and Drug Administration had argued that a cigarette ban would not be "safe" because it would produce indirect adverse effects: "current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop." *Id.* at 16. The Court rejected this argument:

> [T]he FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. . . . Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Id. at 17-19. This ruling directly supports EPA's and the D.C. Circuit's consistent position that the agency may consider only health effects relating to pollutants in the air – not *indirect* health effects.

Given EPA's and the D.C. Circuit's long-settled interpretation; this Court's prior denial of certiorari; and the consistency of the D.C. Circuit's position with this Court's precedent, there is no reason for the Court at this late date to change course and accept cross-petitioners' proposed issue for review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS.

Another reason for denying certiorari on cross-petitioners' proposed issue is that the lower court was plainly correct in ruling that primary NAAQS must be based only on direct health effects of air pollutants. Section 109(b)(1) specifies that primary NAAQS must be "requisite to protect the *public health*." (Emphasis added.) Moreover, primary NAAQS must be "based on" air quality "criteria," § 109(b)(1), which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than direct health impacts of air pollutants have no place in the setting of primary national ambient air quality standards.[3]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Act, which show that Congress knew how to expressly incorporate non-health factors when it wished to do so. For example, § 108(b)(1) provides for EPA to issue "information on air pollution control techniques, which information shall include data relating to the *cost* of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the

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[3] Section 108(a)(2)'s reference to "welfare" is relevant only to the setting of *secondary* national ambient air quality standards, which are to "protect the public welfare." § 109(b)(2).

emission control technology." (Emphasis added.) However, such non-health data is not for the purpose of setting NAAQS, but rather is to be "issue[d] to the States and appropriate air pollution control agencies." § 108(b)(1). Indeed, § 109(b)(1) omits any reference to the § 108(b)(1) control techniques information, instead expressly providing that primary NAAQS are to be "based on . . . [the] *criteria*." (Emphasis added.)

Non-health factors were also referenced in other provisions of the 1970 Act. For example, the 1970 Act retained a preexisting provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." 1970 Act § 312(a), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legislative History") at 7431. Tellingly, § 109(b)(1) omits any reference to such economic and cost analysis as a basis for NAAQS.

In addition, the 1970 Act provided that NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), 1970 U.S. Code Cong. & Ad. News 1959-60, but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A), 1970 U.S. Code Cong. & Ad. News 1962. Likewise, other provisions of the Act expressly incorporate non-health factors such as cost and feasibility. § 111(a)(1), 1970 U.S. Code Cong. & Ad. News

1963 (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b), 1970 U.S. Code Cong. & Ad. News 1989 (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Recognizing this general principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for non-health factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

The absence of non-health factors from the statutory provisions governing primary NAAQS, coupled with their presence in other portions of the Act, is fully sufficient grounds to reject cross-petitioners' proposed interpretation of the Act. But there is additional compelling evidence that Congress's exclusion of non-health factors from the setting of NAAQS was a deliberate choice.

1967 Act. For example, in the predecessor to the 1970 Act (the Air Quality Act of 1967), Congress had provided for issuance of air quality criteria and control techniques

information by EPA's predecessor agency, the Department of Health, Education, and Welfare (HEW). As in the 1970 Act, criteria were defined in terms of direct effects of air pollutants on health, in wording very similar to the comparable wording in § 108(a)(2) of the 1970 Act.[4] As in the 1970 Act, control techniques information encompassed consideration of non-health factors such as cost – indeed, it was even broader, expressly requiring "cost-effectiveness analyses."[5] As in the 1970 Act, ambient air quality standards were to be established. 1967 Act § 108(c), 1967 U.S. Code Cong. & Ad. News 523-24.

Despite the similarities, however, the 1967 Act differed in certain key respects from the 1970 Act. Under the 1967 Act, not only control techniques, but also air quality *criteria*, were to be "issue[d] to the *States*," § 107(b)(1), 1967 U.S. Code Cong. & Ad. News 522 (emphasis added), which were to have the first opportunity to establish ambient air quality standards. § 108(c)(1), 1967 U.S. Code Cong. & Ad. News 523. HEW was to determine whether

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[4] 1967 Act § 107(b)(2), 1967 U.S. Code Cong. & Ad. News 522 (criteria shall "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities").

[5] 1967 Act § 107(c), 1967 U.S. Code Cong. & Ad. News 522-23 (control techniques information was to include "technical data relating to the technology and costs of emission control," and "such data as are available on the latest available technology and economic feasibility of alternative methods of prevention and control of air contamination including cost-effectiveness analyses").

"such State standards are consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added). If a state failed to establish standards, or if a Governor so requested, HEW was authorized to issue federal ambient air quality standards, which – like state-issued standards – were to be "consistent with the air quality criteria *and recommended control techniques.*" § 108(c)(2), 1967 U.S. Code Cong. & Ad. News 523-24 (emphasis added).

In enacting the 1970 Act, Congress rejected several key aspects of the 1967 approach. Of key importance, Congress *deleted* the linkage between control techniques information and ambient air quality standards: instead of being consistent with the criteria *and* control techniques information, standards were henceforth to be based only on the "criteria," § 109(b)(1) – i.e., based only on direct health effects of air pollutants.

This conclusion is further confirmed by another change made by the 1970 Act. Specifically, in 1970 Congress shifted responsibility for ambient standard-setting from the states to EPA, and accordingly deleted the 1967 Act's requirement that criteria be issued "to the States." § 108(a)(2) ("EPA shall *issue* air quality criteria") (emphasis added). In sharp contrast, Congress *retained* the 1967 Act's requirement that *control techniques information* be issued "to the States and appropriate air pollution control agencies," § 108(b)(1), thus confirming that that information – and the non-health factors addressed in it – is not for use in *EPA's* standard-setting.

Finally, the 1970 Act deleted the 1967 Act's requirement that control techniques information include "cost-

effectiveness analyses." If Congress did not provide for such analyses to be included even in control techniques information, which under § 109(b)(1) is irrelevant to NAAQS-setting, there is no basis for asserting that such analyses are required or even permissible in establishing the NAAQS themselves.

1970 House and Senate Bills. Further confirmation of Congress's decision to exclude non-health factors is found in the evolution of the 1970 committee bills. First, the Senate bill provided for ambient air quality standards to be based on health, with no provision for consideration of non-health factors. S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970). The Senate Committee noted that "[i]n the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards." *Id.* at 2. The Senate Committee concluded that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." *Id.* As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (September 21, 1970). *See Union Electric*, 427 U.S. at 257 ("[The Act's] requirements are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.") (citation omitted).

Second, although the House bill adopted an approach weaker than that of the Senate bill, the conferees rejected the House approach. The House bill, though it did not expressly require or allow NAAQS to be based on non-health factors, did not include as strong a mandate for consideration of health as the Senate bill. 116 Cong. Rec. 19224 (June 10, 1970). Moreover, other provisions of the House bill provided for consideration of non-health factors in implementing the NAAQS.[6] In response, the conferees deleted any references that they believed would diminish public health protection:

> In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as

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[6] For example, the House bill had authorized EPA to file federal enforcement actions where NAAQS were not being met, and had provided that district courts would have jurisdiction to order appropriate relief, "giving due consideration to the practicability and to the technological and economic feasibility of complying with provisions of the [pollution control] plan established to implement such [ambient air quality] standards." 116 Cong. Rec. 19225 (House bill § 108(c)(4)). The conferees deleted that provision in favor of an enforcement authority not premised on practicability or technological and economic feasibility. 1970 Act § 113, 1970 U.S. Code Cong. & Ad. News 1966-68.

> the primary standards were concerned relating to public health. Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted.

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972), at 18-19 (remarks of Senator Eagleton, a 1970 Act conferee).

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> Giving due consideration to economic and technological feasibility of compliance.
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21 (remarks of Senator Eagleton).

In short, the evolution of the Senate and conference bills clearly shows that the absence of non-health factors from § 109(b)(1) was no accident, but reflects a deliberate congressional choice.

Post-1970 Congressional Action. Twice since 1970, Congress has enacted major overhauls of the Act – in 1977 and 1990. Yet, despite the longstanding agency and judicial interpretations construing the Act, Congress did not amend § 109 or 108 to allow or mandate consideration

of non-health factors in NAAQS-setting. To the contrary, Congress continued the 1970 Act's mandate that NAAQS be based on direct health effects of air pollutants, and instead made adjustments in the provisions governing implementation of NAAQS. *E.g.*, Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987); Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) (extensive amendments addressing designation of areas violating NAAQS, preparation of pollution control plans, and deadlines for attainment of NAAQS).

In 1977, Congress amended § 109 by adding a requirement for periodic review and revision of NAAQS at intervals of no more than five years. § 109(d). Far from changing § 109(b)(1)'s exclusive focus on direct health effects of air pollutants, Congress expressly reaffirmed that focus with an express cross-reference to § 109(b). § 109(d)(1).[7]

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[7] Section 109(d) also mandated a scientific review committee, which was to advise EPA (inter alia) "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). Section 109(d) neither authorizes nor requires EPA to consider the § 109(d)(2)(C)(iv) factors in revising NAAQS, and the legislative history confirms that those factors were designed to be "of interest and assistance *to the States and to Congress* in fashioning future legislation." H.R. Rep. 294, 95th Cong., 1st Sess. 183 (1977), *reprinted in* 1977 Legislative History at 2650 (emphasis added).

In addition, the 1977 Amendments provided for consideration of non-health factors in various provisions of the Act, once again demonstrating that Congress knew how to incorporate such factors when it wished to do so. For example, the 1977 Amendments added § 317, 42 U.S.C. § 7617, which mandates an "economic impact assessment" in connection with certain specified proceedings, not including NAAQS, § 317(a), and even as to the covered proceedings cautions that the assessment requirement does not change the substantive factors EPA is required to consider. § 317(c).

Likewise, the 1990 Act added a mandate for hazardous air pollutant emission standards that expressly references cost:

> Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors,* an adverse environmental effect.

§ 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Though Congress thus knew full well how to incorporate non-health factors such as cost into EPA standard-setting, it made no such change in § 109(b)(1).

In short, the statute and its development overwhelmingly demonstrate the correctness of the D.C. Circuit's longstanding precedent holding that the Act's provisions governing primary NAAQS bar EPA from considering "any factor other than health effects relating to

pollutants in the air." App. 13 (internal quotations omitted). Accordingly, the cross-petitions seeking to reopen that long-settled issue should be denied.

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE.

In addition to raising questions the Court should not and need not entertain, the questions proposed in the cross-petitions are argumentative, and should be rejected on that ground as well. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

The question proposed by ATA's cross-petition assumes (by using the phrase "given that") that consideration of non-health factors would avoid constitutional nondelegation issues. As shown above, however, the Clean Air Act – an EPA's interpretation of the Act – are constitutional, regardless of whether consideration of non-health factors is prohibited, allowed or required. Part I.A, *supra*. Moreover, incorporation of non-health factors into § 109(b)(1) would broaden, not narrow, the scope of the congressional delegation. Part I.B, *supra*.

The question proposed by Appalachian Power's cross-petition makes at least three argumentative assumptions. First, it assumes that EPA's decisions under § 109 consist exclusively of "risk management" – words that appear nowhere in the statutory provisions governing NAAQS. Second, it assumes that NAAQS have "*broad* economic, environmental, and indirect public health consequences." (Emphasis added.) The validity of certain impacts alleged by opponents of the 1997 NAAQS (*e.g.*,

alleged environmental impacts of changes in mine tax revenues, *see* App. 20, and alleged reductions in personal income that allegedly affect health) is disputed by many, including ALA.

Finally, and most egregiously, Appalachian Power's issue assumes that in the two rulemakings at issue here, EPA faced "a range of standards that reflect *uncertain and indistinguishable* health risks." (Emphasis added.) The EPA decisions under review "are based on some of the best scientific information the Agency has ever been able to rely on in NAAQS decision-making. In particular, the science underlying these decisions is much more extensive and of much better quality than the science underlying the existing NAAQS for PM and ozone." 62 Fed. Reg. 38881 n.53 (July 18, 1997). The D.C. Circuit did not in any way question the validity of the science relied on by EPA, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Based on the science, EPA concluded that the 1997 NAAQS would each year prevent thousands of deaths, thousands of hospitalizations for respiratory and cardiopulmonary causes, tens of thousands of cases of reduced lung function and respiratory pain, and millions of days of missed work and restricted activity. ALA Pet. at 6, 12.

Appalachian Power's attempt to assume away these findings with an argumentatively worded question should be rejected.

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT.

Cross-petitioners ATA and Appalachian Power argue that their cross-petitions are unnecessary, because ATA and Appalachian Power allegedly can raise the non-health factors issue independently of any cross-petition. ATA Cross-Pet. at 27-30; Appalachian Power Cross-Pet. at 4. Indeed, Appalachian Power has even attempted to reformulate the nondelegation question presented by ALA, EPA, and Massachusetts in such a manner as to incorporate that issue. Appalachian Power Rsp. at i (asserting that nondelegation question should include consideration of "whether the court of appeals properly construed the scope of the Agency's discretion in defining [intelligible] . . . criteria."). To the contrary, as ALA has shown above, the non-health factors issue is not a part of – and is not necessary or helpful to resolution of – the constitutional nondelegation issue. Moreover, insertion of that issue into the case would not "preserve" the judgment below, but on the contrary would "change" it. *See* ATA Cross-Pet. at 27 (quoting *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999)).

ATA argues that because EPA must (for reasons other than the lower court's nondelegation ruling) conduct

further proceedings in any event, cross-petitioners' proposed issue would not change or enlarge cross-petitioners' rights. ATA Cross-Pet. at 27-30. This argument is doubly flawed. First, it is open-ended: because § 109(d)(1) mandates cyclical EPA review of NAAQS at intervals not exceeding five years, EPA will *always* be facing the need to conduct further proceedings. Second, the judgment below did not simply require EPA to conduct further proceedings, but also defined requirements governing those proceedings. In particular, EPA must identify a "determinate criterion for drawing lines," App. 5, in a manner that considers only "health effects relating to pollutants in the air." App. 13 (citation omitted). Cross-petitioners' proposed question would (if cross-petitioners prevail) change these requirements, such that cross-petitioners would have an opportunity to argue on remand for consideration of non-health factors – and EPA would no longer be able to assert a lack of statutory authority to undertake such consideration. Indeed, Ohio argued below not only that EPA has authority under the Clean Air Act to consider non-health factors, but also that the Unfunded Mandates Reform Act *requires* the agency to exercise that authority by considering those factors. Ohio Opening Br. in D.C. Cir. No. 97-1440 at 15 ("the CAA, in conjunction with UMRA, affirmatively *compels* EPA to consider cost and benefits") (emphasis added). *See also* p. 3, *supra* (citing assertions by cross-petitioners in this Court that EPA must consider non-health factors).

In short, cross-petitioners' argument concerning non-health factors seeks both a change in – and an enlargement of cross-petitioners' rights under – the D.C. Circuit's judgment. Accordingly, cross-petitioners' assertion

that they may raise that argument independently of a cross-petition should be rejected.

CONCLUSION

For the foregoing reasons, the cross-petitions of ATA and Appalachian Power should be denied.[8]

DATED: April 12, 2000.

Respectfully submitted,

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[8] ALA takes no position on the cross-petition of Citizens for Balanced Transportation.

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Nos. 99-1426, 99-1431 and 99-1442

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly reaffirmed the long-standing principle that, in setting and revising National Ambient Air Quality Standards (NAAQS) under Section 109 of the Clean Air Act, the Environmental Protection Agency (EPA) may not consider the costs, technical feasibility, or other alleged effects of implementing measures to attain the NAAQS (Nos. 99-1426 and 99-1431).

2. Whether the court of appeals properly resolved various claims, by postponing decision or rejecting them outright, that EPA's primary and secondary NAAQS for fine particulate matter ($PM_{2.5}$) are inadequate to protect public health and welfare (No. 99-1442).

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In the Supreme Court of the United States

No. 99-1426

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 99-1431

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 99-1442

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION

STATEMENT

The federal government's petition for a writ of certiorari (No. 99-1257) seeks review of the court of appeals' ruling that the Environmental Protection Agency (EPA) has interpreted the Clean Air Act (CAA) in a way that effects an unconstitutional delegation of legislative power. 99-1257 Pet. I. The petition also challenges the court of appeals' premature and mistaken ruling limiting how EPA may implement one of the two remanded National Ambient Air Quality Standards (NAAQS) at issue—the ozone NAAQS. *Ibid.* The cross-petitions seek to introduce two sets of unrelated issues involving particular details of the underlying rulemakings.

First, two groups of industrial interests, the American Trucking Associations, *et al.* (ATA), and Appalachian Power Company, *et al.* (APC), ask this Court to review the court of appeals' unanimous statutory ruling that, in setting and revising NAAQS, EPA is precluded from considering the economic costs and effects of implementing those standards. ATA Cross-Pet. i; APC Cross-Pet. i. That ruling reaffirms EPA's 30-year-old construction of the CAA and a series of unanimous judicial decisions stretching over 20 years. See 99-1257 Pet. App. 19a-21a.

Second, a group of environmental interests, Citizens for Balanced Transportation, *et al.* (CBT), seeks review of particular challenges to EPA's selection of the 24-hour primary NAAQS for particulate matter (PM) of 2.5 microns or less ($PM_{2.5}$) and its selection of the secondary NAAQS for $PM_{2.5}$. CBT Cross-Pet. i. The court of appeals concluded that it could not reach most of those issues in light of its remand to the agency. See 99-1257 Pet. App. 4a-5a.

We describe below the court's reasoning on the issues raised by the cross-petitions.

1. The court of appeals' decision in this case addresses a broad range of industry and environmental challenges to EPA's ozone and PM NAAQS. Among other things, the decision reiterates the long settled principle that, "in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." 99-1257 Pet. App. 19a. The court of appeals has consistently held that EPA must set NAAQS based on the "health effects relating to pollutants in the air" and not on alleged costs or other effects that may result from implementation of the NAAQS. *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (EPA need not consider alleged health effects associated with unemployment), cert. denied, 498 U.S. 1082 (1991); see also *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

The court expressly considered and rejected ATA's and APC's arguments that it should reconsider its decision in *Lead Industries* because that case was decided without the benefit of this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court explained:

> The *Lead Industries* decision was made in *Chevron* step one terms, * * * as the post-*Chevron* progeny of *Lead Industries* have made clear. [*Natural Resources Defense Council, Inc.* v. *EPA*], 902 F.2d [962,] 973 [(D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991)] ("Consideration of costs . . . would be flatly inconsistent with the statute, legislative history and case law on this point"); *NRDC* v. *EPA*,

824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("*Vinyl Chloride*") ("[S]tatute on its face does not allow consideration of technological or economic feasibility.").

99-1257 Pet. App. 19a-20a.

The court of appeals additionally considered and rejected the argument that, even if EPA could not consider costs in initially setting NAAQS, it could do so when revising NAAQS. 99-1257 Pet. App. 20a. Finally, the court rejected the industrial groups' argument that Congress's directions to the Clean Air Scientific Advisory Committee (CASAC) to advise EPA on, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS, CAA, § 109(d)(2)(C)(iv), 42 U.S.C. 7409(d)(2)(C)(iv), signals that EPA should consider those factors in revising NAAQS. 99-1257 Pet. App. 21a. Instead, the CAA directs CASAC to provide that advice in light of EPA's separate duty to give the States information on control strategies. *Ibid.*

2. CBT challenged as arbitrary and capricious EPA's decision not to set a more stringent 24-hour primary NAAQS and more stringent 24-hour and annual secondary NAAQS for $PM_{2.5}$. Because the court of appeals remanded the $PM_{2.5}$ NAAQS on nondelegation grounds, the court of appeals did not rule on CBT's claims except in one narrow respect. 99-1257 Pet. App. 5a, 56a. In the final rule, EPA had announced its decision to address adverse effects that fine PM may have on visibility by establishing secondary $PM_{2.5}$ NAAQS (at the same levels as the primary $PM_{2.5}$ NAAQS) and by implementing the Regional Haze Program described in Section 169A of the CAA, 42 U.S.C 7491. 99-1257

Pet. App. 56a; 62 Fed. Reg. 38,652, 38,683 (1997). The court of appeals rejected CBT's argument that Section 109(b)(2), 42 U.S.C. 7409(b)(2), requires EPA to set secondary NAAQS that will eliminate *all* adverse effects on visibility and deprives EPA of authority to address some impairment of visibility through another program. 99-1257 Pet. App. 57a. The court explained that the CAA included the Regional Haze Program to address adverse effects on visibility that may persist in areas such as national parks "notwithstanding attainment and maintenance of all [NAAQS]." *Ibid.*

3. Neither ATA, APC, nor any other party sought rehearing on the cost issue. CBT filed petitions for rehearing and rehearing en banc as to all of its claims. CBT's petitions were denied without dissent. 99-1257 Pet. App. 71a, 101a.

ARGUMENT

As our petition for a writ of certiorari explains, the court of appeals has erred in two fundamental respects: (1) it remanded EPA's revised PM and ozone NAAQS based on an aberrant notion of the nondelegation doctrine (99-1257 Pet. 9-10, 11-19); and (2) it prematurely and mistakenly decided how EPA should eventually implement the ozone NAAQS (99-1257 Pet. 19-30). As our reply brief explains, respondents have failed to provide persuasive reasons against review. Instead, they have recharacterized the court of appeals' decision in ways that obfuscate the issues. The cross-petitions at issue here add another layer of complexity and confusion. They raise no issue that would independently warrant review or that would assist the Court in resolving the core nondelegation issue. To the contrary, the cross-petitions would complicate the case with issues that, on the one hand, have long been settled or,

on the other hand, the court of appeals had no occasion to reach.

1. The flaws in the court of appeals' nondelegation analysis are not difficult to discern. This Court has developed the nondelegation doctrine to preserve the Constitution's separation of governmental powers. *E.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371-372 (1989). It prohibits *Congress* from vesting its legislative power in an executive branch agency. *Ibid.* The court of appeals erred because it misconceived the nondelegation doctrine as a judicial check on agency discretion. See 99-1257 Pet. App. 14a. The court of appeals' decision confuses two distinct lines of inquiry and, in the process, wrongly sets aside legitimate agency action. The Court should therefore correct that fundamental misconception and remand the case to the court of appeals with directions to review the EPA's rules under the correct standard of review. See 99-1257 EPA Reply Br. 2-6.

ATA and APC urge a different course. They argue that the Court should *broaden* the inquiry and use the court of appeals' mistake as a vehicle for setting aside long-settled statutory principles that have guided EPA's implementation of the CAA for 30 years. They specifically challenge the firmly established principle that EPA should set NAAQS based on the public health and welfare effects caused by the pollutant's presence in the ambient air and not on the potential economic costs or other alleged effects of implementing the NAAQS. See ATA Cross-Pet. 14-27; APC Cross-Pet. 14-25. The court of appeals was divided on the nondelegation issue, but it unanimously rejected the industrial groups' arguments on this point and reiterated its past holding that the CAA directs that questions of economic costs and the other effects of implementing

NAAQS can be considered only as part of the implementation process. 99-1257 Pet. App. 19a-21a.

The Court should decline ATA's and APC's invitation to complicate consideration of the nondelegation issue. The court of appeals' decision is correct as to the issue they raise. Moreover, it rests on settled law that has long guided the actions of EPA, Congress, and the courts. Contrary to ATA's urgings, the constitutional question of whether Congress has vested EPA with legislative power is not "tightly intertwined" (ATA Cross-Pet. 7) with the statutory issue of whether Congress directed EPA to set NAAQS based solely on health and welfare effects of ambient pollution concentrations.

a. Congress introduced the NAAQS-based framework through the enactment of the Clean Air Act Amendments of 1970.[1] Since that time, EPA has consistently applied Section 109 according to its terms, which require EPA to set primary NAAQS at levels "requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). EPA has consistently rejected the notion that, when promulgating NAAQS, it may consider costs, technical feasibility, or related factors.[2] ATA and APC ask this Court to overturn 20

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[1] As this Court has recognized, Congress was dissatisfied with progress under the Air Quality Act of 1967, Pub. L. No. 90-148, § 2, 81 Stat. 485, and enacted the Clean Air Act Amendments of 1970 to make far-reaching changes in the Nation's approach to air pollution control. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975); see *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-257 (1976).

[2] When promulgating the first NAAQS, Administrator Ruckelshaus announced that no revisions were made to the proposed NAAQS in response to comments questioning the feasibility of their implementation. He stated that the CAA "does not permit

years of court of appeals precedent—decided in the course of reviewing predecessor NAAQS—upholding that interpretation.[3]

As ATA acknowledges (Cross-Pet. 5-6), this Court has repeatedly declined to review the issue that ATA and APC press here.[4] There is no reason to reach a different result now. ATA offers no support for its claim that the court of appeals itself "now lacks confidence" in the holding of *Lead Industries* (Cross-Pet. 17-18). To the contrary, the court of appeals has repeatedly rejected ATA's and APC's principal arguments without a single dissent.[5] The cross-petitions do not raise a controversial issue; the entire District of

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any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (1971). See also, *e.g.*, 62 Fed. Reg. at 38,683-38,688 (detailed response to comments on this issue in the PM rulemaking).

[3] *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); see also *Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146, 1158-1159 (D.C. Cir. 1987) (en banc) (*Vinyl Chloride*).

[4] See Pet. at 8-11, *St. Joe Minerals Corp.* v. *EPA*, cert. denied, 449 U.S. 1042 (1980) (No. 80-483); Pet. at 18-23, *American Petroleum Inst.* v. *Gorsuch*, cert. denied, 455 U.S. 1034 (1982) (No. 80-871).

[5] Since 1980, 15 judges of the District of Columbia Circuit—including Judge Bork writing for the court en banc in *Vinyl Chloride*—have expressed approval of EPA's interpretation. Contrary to APC's assertion (Cross-Pet. 24), nothing in any of the decisions after *Lead Industries* remotely suggests that the court of appeals felt "its hands were tied" by that decision. See cases cited in note 3, *supra*.

Columbia Circuit has long viewed the matter as settled. See 99-1257 Pet. App. 19a. Indeed, if ATA and APC thought otherwise, they should have challenged the panel's unanimous ruling through a petition for rehearing en banc.

The court of appeals and EPA have correctly concluded that Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Section 109(b)(1) of the CAA directs EPA to set primary NAAQS at a level "requisite to protect the public health." See 42 U.S.C. 7409(b)(1). It does not direct EPA to consider economic and other costs when setting NAAQS, and there is no basis for inferring that Congress intended those factors to be considered at that initial stage of the regulatory process. The language and structure of the 1970 CAA demonstrate that the overriding purpose of NAAQS promulgation is to determine, as the first step of the CAA regulatory program, the ambient air quality standards that are necessary to protect the public health and welfare. Neither Section 108, which specifies the kinds of factual information upon which NAAQS must be based, nor Section 109, which contains the legal test NAAQS must meet, discusses or otherwise suggests any consideration of cost or technical feasibility. See *Lead Indus. Ass'n*, 647 F.2d at 1149; *Vinyl Chloride*, 824 F.2d at 1158.[6]

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[6] The States of Ohio, Michigan, and West Virginia suggest in their brief supporting the cross-petitions (Midwest States Br. 9-13) that there is a broader inconsistency in the District of Columbia Circuit's case law with respect to whether administrative agencies ever have authority to consider factors other than those explicitly mentioned in enabling legislation. This alleged conflict goes beyond any question presented in a timely petition or cross-peti-

Section 109(b)(1) specifically requires NAAQS to be "based on" the air quality "criteria" that EPA issues under Section 108. 42 U.S.C. 7409(b)(1). Section 108(a)(2), in turn, limits the kind of information to be included in the "criteria" to "the latest scientific knowledge" about effects on health and welfare "which may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. 7408(a)(2). Section 108(a)(2) makes no mention whatsoever of effects from *implementing* the NAAQS—it mentions only effects resulting from the presence of a criteria pollutant in the air. That silence is telling in light of other sections of the Clean Air Act Amendments of 1970 where Congress expressly provided that EPA should consider costs and similar factors in making decisions.[7]

The structure of the CAA also indicates that EPA should promulgate NAAQS based on health and welfare effects and not on the basis of costs or alleged adverse effects that may result from their implemen-

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tion. Moreover, the question cannot be addressed in such abstract terms, because the answer depends on the purpose and context of a particular statute. The principle of *expressio unius est exclusio alterius* is merely one tool of statutory construction, not a rule of law, see *Shook* v. *District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998); *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), and therefore its application can be expected to differ from one circumstance to another.

[7] *E.g.*, Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 110(e)(1), 84 Stat. 1682 (authorizing EPA to grant States up to a two-year extension of a NAAQS attainment date if necessary technology is not available); § 111(a)(1), 84 Stat. 1683 (requiring consideration of economic and technological feasibility in establishing standards of performance for new stationary sources); § 231(b), 84 Stat. 1704 (authorizing consideration of economic and technical feasibility in establishing aircraft emission standards).

tation. As this Court recognized long ago, the CAA is a "technology-forcing" statute that sets ambitious goals to protect public health and welfare. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975). In that respect, Congress has indicated expressly when and to what extent costs and implementation effects shall be considered in the regulatory process. See *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976).[8]

For example, States are entitled to develop State Implementation Plans (SIPs) governing how NAAQS will be implemented within their borders. See CAA § 110, 42 U.S.C. 7410. States may properly consider the costs of NAAQS implementation when formulating the SIPs, and EPA may not override those judgments so long as the SIP will achieve attainment of the NAAQS. See *Union Elec. Co.*, 427 U.S. at 256-269.[9] The Court also recognized that the CAA does not allow a State to rely on those considerations at the expense of meeting the statutory deadlines for attaining the national health-based standards. *Id.* at 266-269.[10] The Court's

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[8] See 427 U.S. at 269 ("Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.").

[9] See, *e.g.*, 427 U.S. at 266 ("Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires * * * and industries with particular economic or technological problems may seek special treatment in the plan itself.").

[10] See, *e.g.*, 427 U.S. at 268-269 ("In short, the [Clean Air Act Amendments of 1970] offer ample opportunity for consideration of claims of technological and economic infeasibility. Always, how-

longstanding decision in *Union Electric*, describing the CAA as a "technology-forcing" statute and explaining how cost considerations are introduced into the regulatory scheme on a State-by-State basis in the implementation process, would make little sense if EPA had to promulgate NAAQS based on an analysis of costs and related implementation factors at the outset of the regulatory process.[11]

As the court of appeals has repeatedly noted, the legislative history of the 1970 Amendments confirms the paramount importance of setting primary NAAQS based solely on the health effects posed by the pollutant in the ambient air. See *Vinyl Chloride*, 824 F.2d at 1158; *Lead Indus. Ass'n*, 647 F.2d at 1149. For example, the Senate report accompanying the 1970 Amendments states:

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many

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ever, care is taken that consideration of such claims will not interfere substantially with the primary goal of prompt attainment of the national standards. * * * Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.").

[11] Section 110 of the 1970 CAA, which was construed by the Court in *Union Electric*, has since undergone considerable revision, but the principles set forth above have not been altered. See *Virginia* v. *EPA*, 108 F.3d 1397, 1407-1409 (D.C. Cir. 1997); 42 U.S.C. 7410(k).

> areas, even with application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.

S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970). In other words, the primary NAAQS should be based on health effects rather than economic or technical feasibility, and as a result, the NAAQS have a "technology-forcing" effect. See *Train*, 421 U.S. at 91; *Union Elec. Co.*, 427 U.S. at 257, 269.

At bottom, APC urges this Court to revisit the long-settled question of whether EPA should consider costs and other alleged implementation effects in setting NAAQS because, in APC's view, its preferred approach would be "wise social policy." See, *e.g.*, APC Cross-Pet. 6-7. But Congress concluded otherwise, and Congress's choice was certainly a rational one. Congress reasonably concluded that NAAQS should be based on health and welfare considerations alone so that Congress and the public know that EPA's judgments on the health and welfare threats posed by particular criteria pollutants are not compromised by considerations of economic and technical feasibility. As this Court recognized in *Union Electric*, Congress provided the States with flexibility in the implementation process to consider the economic and technical feasibility of attainment, 427 U.S. at 266-269, but it reserved to itself the prerogative of deciding – as a matter of legislative choice – whether and how to alter the statutory scheme

if public health needs should prove to conflict with an industry's economic viability.[12]

Congress has since recognized and exercised that prerogative. See 62 Fed. Reg. at 38,685. In the course of formulating the Clean Air Act Amendments of 1977, Congress was well aware that some areas of the country had been unable to attain some of the NAAQS. See, *e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 207-217 (1977). It was also aware that some of the NAAQS criteria pollutants might be non-threshold pollutants and that significant scientific uncertainties are inherent in setting health-based standards. See *id.* at 43-51, 110-112. In response, Congress made significant changes in the provisions for implementing the NAAQS, including, for example, an extension of the deadline for attaining the ozone NAAQS. It also amended Sections 108 and 109 of the Act to require periodic review and revision of NAAQS and to establish CASAC. Nevertheless, Congress did not change the substantive criteria for setting and revising NAAQS. See 62 Fed. Reg. at 38,685 & n.66 (describing the 1977 Amendments).[13]

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[12] See *Lead Indus. Ass'n*, 647 F.2d at 1150 ("if there is a problem with the economic or technological feasibility of the lead standards, * * * any * * * party affected by the standards, must take its case to Congress, the only institution with the authority to remedy the problem"); 99-1257 Pet. App. 68a-69a (Tatel, J., in dissent, noting the role of politically accountable States in implementing NAAQS and the availability of congressional relief).

[13] In addition to requiring CASAC to advise EPA on issuing new or revised criteria and NAAQS, 42 U.S.C. 7409(d)(2)(B), Congress separately charged CASAC with advising EPA on implementation effects, 42 U.S.C. 7409(d)(2)(C). But that does not mean, as APC contends (Cross-Pet. 22), that EPA is to consider these effects in setting or revising NAAQS. See 99-1257 Pet. App. 21a; p. 4, *supra*. The legislative history removes any doubt on that matter. The House Report indicates that Congress did "not intend

Congress exercised that prerogative again in 1990. The Clean Air Act Amendments of 1990 responded to persistent nonattainment problems by adjusting the scheme for their implementation. See, *e.g.*, CAA §§ 181-192, 42 U.S.C. 7511-7514a. Significantly, Congress was fully aware of how NAAQS are promulgated, and it did not change the legal standard on which NAAQS are based. To the contrary, both the House and Senate Reports accompanying the 1990 Amendments expressly reflect the understanding that primary NAAQS are to be "set at a level that 'protects the public health with an adequate margin of safety,' *without regard to the economic or technical feasibility of attainment.*" H.R. Rep. No. 490, 101st Cong., 2d Sess., Pt. 1, at 145 (1990) (emphasis added); accord S. Rep. No. 228, 101st Cong., 1st Sess. 5 (1989). Congress's actions confirm that the court of appeals and EPA have correctly discerned congressional intent to preclude consideration of economic and technical feasibility in setting and revising NAAQS. Cf. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-602 (1983) (Congress "affirmatively manifested its acquiescence" in IRS policy by articulating the policy in committee reports accompanying related legislation); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction").

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this provision to be used as a basis for the Administrator to disapprove any State's plan," but "may be of interest and assistance to the States and to Congress in fashioning future legislation." H.R. Rep. No. 294, *supra*, at 183.

ATA attempts to overcome the overwhelming evidence of congressional intent by drawing analogies from this Court's decision in *Industrial Union Department* v. *American Petroleum Institute.*, 448 U.S. 607 (1980). See ATA Cross-Pet. 15-16. That case, however, involves a different statute, with different language, that creates an entirely different regulatory program. The Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.*, directs the Secretary of Labor to establish "occupational safety and health standard[s]," 29 U.S.C. 655(b), that are directly applicable to industrial employers and that are directly enforced by federal officials. 29 U.S.C. 658-659. The OSH Act *expressly* requires the Secretary to consider whether standards dealing with toxic materials or harmful physical agents are "feasible." 29 U.S.C. 655(b)(5).

The CAA's NAAQS promulgation process, by contrast, is simply the first step in a federal-state regulatory program and does not create standards that are themselves directly applicable to any air pollution source. The CAA directs EPA to set NAAQS at levels of air quality "requisite" to protect public health and welfare, but the CAA empowers the States to determine appropriate emission limitations and other controls on individual air pollution sources. See generally *Train, supra*; *Union Elec. Co., supra.* Unlike the OSH Act scheme, the CAA requires the Administrator to determine, as an initial matter, the exposure limitations necessary to protect health and welfare and leaves to the States discretion to consider—consistent with their obligation to meet the attainment deadlines—the economic or technological feasibility of compliance. See *Union Elec. Co.*, 427 U.S. at 259 (quoting S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970)).

ATA's and APC's reliance on the court of appeals' en banc decision in *Vinyl Chloride*, 824 F.2d at 1158-1159, is similarly misplaced. See ATA Cross-Pet. 15-18; APC Cross-Pet. 9-10, 19. That decision in no way "strongly suggests" that the District of Columbia Circuit "now lacks confidence" in its *Lead Industries* decision. ATA Cross-Pet. 17-18. To the contrary, the court concluded that EPA should consider economic and technical feasibility when setting individual *emission standards* for specific hazardous air pollutants under Section 112 of the CAA, 42 U.S.C. 7412. It expressly distinguished Section 109's method for promulgating NAAQS. Writing for the en banc court, Judge Bork explained that the language and structure of the CAA support the conclusion that "Congress simply did not intend the economics of pollution control to be considered in [Section 109's] scheme of ambient air regulations." 824 F.2d at 1159.[14]

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[14] We note that EPA attempts to estimate the costs and benefits of implementing NAAQS as part of its Regulatory Impact Analysis (RIA), but it does so only for informational and implementation planning purposes and not as a part of its standard setting process. See 62 Fed. Reg. at 38,702; C.A. App. (PM) 3461-3462. ATA and APC rely selectively on those estimates to create a distorted picture of the potential costs and benefits of the NAAQS in this case. For example, APC and ATA cite EPA's estimate of the cost of fully attaining the revised PM standards ($37 billion) without mentioning EPA's estimate that those standards would produce quantifiable benefits of $20 to $110 billion. Compare APC Cross-Pet. 13 n.23 and ATA Cross-Pet. 4 with C.A. App. (Ozone) 2925. Nor does either mention EPA's estimate that the *net* quantifiable benefits to be derived from only partial attainment of the combination of the revised PM and ozone NAAQS would range from $9.5 to $96 billion. C.A. App. (PM) 3488. Furthermore, it is difficult, if not impossible, for EPA to account for the future development of innovative control technologies when it sets or revises NAAQS. C.A. App. (PM) 3471-3472. Because of the technology-forcing character of the NAAQS, EPA has historically

b. As the foregoing discussion shows, the ATA and APC cross-petitions do not present an issue that would warrant review in its own right: The court of appeals has repeatedly and correctly rejected ATA's and APC's arguments; those rulings have not produced any dissent; this Court has repeatedly declined to review the issue; and ATA and APC did not seek relief from the en banc court before petitioning for a writ of certiorari yet again. ATA nevertheless argues that this Court should combine its review of the nondelegation issue and this particular statutory issue because the issues are "inextricably intertwined." ATA Cross-Pet. 7; see also APC Cross-Pet. 4 (cost issue is "fairly within the scope of the initial petitions"). That assertion is correct only in the haphazard sense that a fishing line might become intertwined with a tree limb. Enlarging the grant would complicate an already complex case and would require the Court to disentangle inquiries that are properly separate and that the court of appeals treated as distinct. Indeed, the court of appeals panel was divided on the nondelegation issue, but unanimous on the supposedly "intertwined" statutory issue that ATA and APC present.

ATA concedes, in response to our petition, that Section 109 of the CAA itself does not violate the nondelegation doctrine. 99-1257 ATA Br. 15 (Section 109 is "undisputedly" constitutional); see also 99-1257 APC Br. 8 ("The court did *not* hold the statute itself unconstitutional."). Significantly, ATA does not contest our showing (99-1257 Pet. 11-16) that the CAA provides EPA with sufficient statutory direction to avoid delegating legislative power. See, *e.g.*, *Mistretta* v.

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*over*estimated the actual cost of their implementation and attainment. See *ibid.*

United States, 488 U.S. 361, 372-373 (1989). Instead, ATA defends the court of appeals' decision on the ground that EPA's "interpretation" of the CAA violates the nondelegation doctrine. See 99-1257 ATA Br. 11; 99-1257 APC Br. 10-11, 13; see also 99-1257 Pet. App. 4a ("we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power").

Our petition takes specific issue with that proposition. See 99-1257 Pet. 16. The nondelegation doctrine is a check on Congress's grant of legislative powers and not—as the court of appeals and cross-petitioners would have it—a mechanism for controlling an agency's exercise of discretion. See *ibid.* We are hardly alone in that view. See, *e.g.*, 99-1257 Pet. App. 94a (Silberman, J., dissenting from the denial of rehearing en banc) ("Th[e] purpose [of the nondelegation doctrine] is, of course, to ensure that *Congress* makes the crucial policy choices that are carried into law."); *id.* at 98a (Tatel, J., joined by Edwards, C.J., and Garland, J., dissenting from denial of rehearing en banc) ("For purposes of constitutional analysis, we thus have no need to require that EPA state 'a far more determinate basis for decision' beyond the intelligible principle Congress provided in the Clean Air Act".).

We urge the Court to correct that basic conceptual error and, in accordance with its usual practice, return the case to the court of appeals so that the court can conclude its task of properly evaluating EPA's rulemakings under the statutory arbitrary and capricious standard set out in Section 307(d)(9) of the CAA, 42 U.S.C. 7607(d)(9). The Court has no occasion to venture further by undertaking belatedly to decide anew a

question of statutory construction that the court of appeals and Congress properly settled long ago.

ATA presses the Court to go further based on its inaccurate characterization of what the court of appeals decided. ATA argues that "the court below was forced to consider constitutional nondelegation issues because that court had misconstrued the Clean Air Act in *Lead Industries* and subsequent cases." ATA Cross-Pet. 5. ATA's characterization is fantasy. This case generated six opinions on panel review and petition for rehearing and rehearing en banc, and *not a single judge on the District of Columbia Circuit* expressed ATA's view of the case. Rather, the panel majority and dissenting judges treated the nondelegation issue and ATA's statutory issue as distinct and separate questions.

Specifically, the panel majority declared EPA's actions unconstitutional without reference to *Lead Industries*. 99-1257 Pet. App. 4a. The majority directed EPA "to develop a construction of the act that satisfies this constitutional requirement," *ibid.*, and it offered comment respecting EPA's options on remand, observing that "[c]ost-benefit analysis * * * is not available under decisions of this court," *id.* at 14a-15a. But the panel considered ATA's statutory issue as a separate question, and the panel *unanimously* reaffirmed the correctness of *Lead Industries*, *id.* at 19a-21a. ATA did not challenge the panel's reaffirmation of *Lead Industries* through a petition for rehearing en banc. There is no merit to ATA's assertion that the nondelegation issue and the *Lead Industries* issue are "inextricably intertwined." ATA Cross-Pet. 7.

The fundamental question here remains whether the nondelegation doctrine provides a constitutional limitation on an agency's action. See 99-1257 Pet. App. 4a. If we are correct that the nondelegation doctrine imposes

a separation of powers limitation on Congress – and not a limitation on an agency's exercise of administrative discretion—then this Court should reverse the court of appeals' decision and remand the case to that court to reevaluate EPA's actions under the proper legal standard with the care that befits these important rulemakings. If, to the contrary, the court of appeals correctly applied the nondelegation doctrine, this Court should affirm the court's judgment remanding the cases to EPA so that the agency can "develop a construction of the act that satisfies this constitutional requirement." *Ibid.* In either event, there is no reason for this Court to decide ATA's statutory challenge. The nondelegation ruling and that statutory challenge involve two distinct issues—one controversial and one not. They are related only in the inchoate sense that "everything is related to everything else." *California Div. of Labor Standards Enforcement* v. *Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).[15]

2. CBT's challenges to the 24-hour primary NAAQS for $PM_{2.5}$ should be denied because the issues CBT raises were not addressed by the court below. The

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[15] In deference to the Court's certiorari standards, the federal petitioners have limited their petition for a writ of certiorari to the nondelegation and the "Subpart 2" issues. They have not challenged the court of appeals' other adverse rulings, even though those rulings – such as the court's decision that EPA must evaluate the alleged health benefits of smog (99-1257 Pet. App. 44a-49a) – stand on a more dubious footing than the settled question that ATA and APC seek to raise. The federal petitioners, unlike the cross-petitioners here, have limited their petition to issues that have broader importance and independently meet this Court's standards for certiorari. The constitutional and finality issues that the federal petition presents raise fundamental issues that arise in every case in which a court reviews a federal agency's administration of a regulatory program.

court of appeals concluded that its remand of the ozone and $PM_{2.5}$ NAAQS on nondelegation grounds precluded resolution of most of the other challenges before it, including CBT's challenge to the 24-hour $PM_{2.5}$ primary NAAQS. See 99-1257 Pet. App. 4a-5a. There is no warrant for this Court to address an issue that the court of appeals did not reach.[16]

CBT's challenge to the secondary standards for $PM_{2.5}$ should also be denied. The secondary $PM_{2.5}$ NAAQS, like the 24-hour primary $PM_{2.5}$ NAAQS, were remanded to EPA by the court of appeals for reconsideration in light of that court's holding on nondelegation. Thus, the court below did not reach "the main thrust" of CBT's challenge, 99-1257 Pet. App. 56a, and there is no reason

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[16] CBT's challenges are, in any event, without merit. CBT's assertion that the 24-hour $PM_{2.5}$ primary NAAQS is inconsistent with EPA's risk findings rests on a misunderstanding of those findings. In challenging the 24-hour $PM_{2.5}$ primary NAAQS, CBT largely assumes that EPA can address the risk from daily or short-term peak exposures only through a short-term standard. To the contrary, EPA found that it could most effectively reduce the risks from both long-term and peak $PM_{2.5}$ concentrations through an annual standard of 15 $\mu g/m^3$, together with a 24-hour standard to address unusual circumstances. 62 Fed. Reg. at 38,669. The studies on which EPA relied in setting the standard demonstrated a statistically significant correlation between 24-hour $PM_{2.5}$ concentrations and health effects in cities with annual $PM_{2.5}$ concentrations greater than about 16 $\mu g/m^3$, but did not show such a correlation in cities with annual $PM_{2.5}$ concentrations below that level. *Id.* at 38,676. Thus in setting the annual standard just below that level, *i.e.*, at 15 $\mu g/m^3$, EPA has addressed the statistically significant association between health effects and 24-hour $PM_{2.5}$ exposures demonstrated by the studies in the record. *Id.* at 38,669-38,671. The 24-hour $PM_{2.5}$ primary NAAQS (65 $\mu g/m^3$) serves as an additional margin of safety for localized or seasonal exposures that might not be adequately controlled by the annual standard alone. *Id.* at 38,671.

for this Court to address questions that the court of appeals did not decide. The court of appeals did decide one narrow issue that CBT raises here. The court concluded, over CBT's objection, that EPA may take into account the mitigating effect of the Regional Haze Program in setting the secondary $PM_{2.5}$ NAAQS.

The CAA specifically provides that the purpose of the Regional Haze Program is to address adverse visibility impacts that remain "*notwithstanding attainment* and maintenance of all national ambient air quality standards." 42 U.S.C. 7470(1) (emphasis added). That provision makes clear that EPA is not required to set the secondary NAAQS at a level that eliminates *all* adverse effects on visibility. There is no reason for this Court to review the court of appeals' ruling, which is clearly correct. EPA acted within the scope of its authority in relying on the Regional Haze Program to mitigate some of the adverse visibility effects associated with $PM_{2.5}$. 99-1257 Pet. App. 57a.

CONCLUSION

The conditional cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 99-1426 and 99-1431

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Conditional Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITIONS FILED BY AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, No. 99-1426, AND APPALACHIAN POWER COMPANY, *et al.*, No. 99-1431

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITIONS FILED BY AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, No. 99-1426, AND APPALACHIAN POWER COMPANY, *et al.*, No. 99-1431

Citizens for Balanced Transportation, et al.,[1] oppose these cross petitions because they seek to expand the Court's review to decide constitutional arguments that need not be addressed to resolve challenges to the lawfulness of EPA's national ambient air quality standards. The questions presented by U.S. Environmental Protection Agency and other petitioners[2] seeking review of the D.C. Circuit's novel application to an agency decision of the constitutional doctrine that bars the delegation of Congress' law making power, provide no occasion to determine whether, as the American Trucking Association would have it, the Constitution bars EPA's and the D.C. Circuit's longstanding construction of § 109(b) of the Clean Air Act. The Industry petitioners seek to reopen a long settled question of statutory interpretation by asking the Court to review the 1980 decision by the D.C. Circuit Court of Appeals holding that "the [Clean Air Act] and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir.1980). Citizens for Balanced Transportation, et al., oppose these cross petitions because there is no clause of the Constitution

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[1] Citizens For Balanced Transportation, et al., filed a timely Cross Petition, No. 99-1442, supporting the government's petition on the nondelegation question, and asking that the Court also review the court of appeal's failure to apply the proper standard for review in accord with this Court's teaching in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983), requiring an agency to "articulate a satisfactory explanation for its action. . . . ".

[2] American Lung Association, the Commonwealth of Massachusetts and the State of New Jersey.

that requires an agency to consider costs or feasibility in setting standards for the protection of public health when Congress decided not to require the agency to consider such factors.

REASONS FOR REJECTING QUESTIONS PRESENTED BY INDUSTRY PETITIONERS

None of the criteria for granting certiorari are met by the Industry cross petitions. The court of appeals' long-standing holding affirming the EPA Administrator's initial construction of § 109(b) –

1) has not been questioned by a revised construction of the Act by the agency responsible for its implementation;
2) has been consistently applied by the Court below, including the decision below in *American Trucking Associations v. EPA;*
3) is not in conflict with any decision of this Court or any other court;
4) was correctly decided even under the subsequent teaching of this Court in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984), because the Court affirmed the agency's reasonable interpretation of the Act;
5) was consistent with Congress' enactment in 1977 of § 317, 42 U.S.C. § 7617, which intentionally omitted NAAQS from the statutory obligation imposed on EPA to consider an economic impact assessment when setting other standards under the Act; and
6) was ratified by Congress' 1990 decision to enact a new requirement in § 312, 42 U.S.C. § 7612, directing EPA to report the costs and benefits of NAAQS compliance, but not to amend § 109(b) to require EPA to consider costs as a relevant factor in setting or revising NAAQS.

For these reasons, there is no need to review the D.C. Circuit's holding in *Lead Industries*.

Most importantly, there is no need to review *Lead Industries* to avoid reaching a constitutional issue. Indeed, one of the basic flaws in the decision below was the court's determination of the nondelegation issue without first deciding whether EPA's standards were arbitrary and capricious or consistent with law. Had the Court pursued a traditional inquiry into CBT's argument that EPA failed, as in the case of the 24-hour NAAQS for fine particles, to provide a rational basis for its selection of the standards, then there would have been no occasion to reach the constitutional claims on which the decision was based. Granting the Industry cross petitions would perpetuate and compound that unnecessary and inappropriate inquiry. The Industry cross petitions should therefore be denied.

In the interests of conserving the Court's time and petitioners' resources, CBT adopts here, and relies upon, the detailed analysis of these objections to granting the Industries' cross petitions for certiorari filed by the American Lung Association, petitioner in No. 99-1295.

Respectfully submitted,

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No. 99-1431

IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Cross-Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*
Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, CAA Industry Cross-Petitioners hereby amend the corporate disclosure statement filed with the conditional cross-petition for a writ of certiorari. (Case No. 99-1431). The page numbers of the conditional cross-petition for a writ of certiorari on which CAA Industry Cross-Petitioners requiring amended statements appear are provided for convenience.

Carolina Power & Light Co (p. x)
(10% or greater owner: State Street Bank & Trust Co. Boston)

Detroit Edison Co., The (p. xi)
(a subsidiary of DTE Energy Co.)

Meridian Gold Co. (p. xi)
(a wholly-owned subsidiary of Meridian Gold, Inc.)

Newmont Gold Co. (p. xi)
(10% or greater owner: Newmont Mining Corporation)

Otter Tail Power Co. (p. xi)
(10% or greater owner: Otter Tail Power Co. ESOP)

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ARGUMENT

In its response, EPA describes the "fundamental question" here as not the constitutionality of the Clean Air Act ("CAA" or "Act"), but a much narrower issue: whether the nondelegation doctrine constrains the Agency's discretion as it applies the Act. EPA's re-framing of the issue confirms that, in any review of the lower court's non-delegation holding, this Court must address the nature and scope of the Agency's authority to define "intelligible principles" for making risk management decisions. That is, if certiorari is granted, the question of whether the nondelegation doctrine constrains the Agency's discretion cannot be resolved without this Court examining the nature of the congressional delegation -- an inquiry that requires review of the issue as presented by CAA Industry Cross-Petitioners.

I. THE NATURE OF EPA'S AUTHORITY UNDER CAA § 109 IS CRITICAL TO EVALUATION OF THE NONDELEGATION ISSUE.

This case concerns EPA's extraordinary claim of authority to make risk management decisions without guiding principles. Based on *Lead Industries* and cases that have relied upon it,[1] EPA argued to the lower court that "nothing in the statute requires [the Administrator] to make any specific 'findings' or to structure her decisionmaking in any particular way" when she judges risk under CAA § 109, even when her choices lie along a continuum of uncertain and indistinguishable health risks. EPA Resp. Br. (D.C. Cir. 97-

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[1] *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *American Petroleum Inst. v. EPA*, 665 F.2d 1176 (D.C. Cir. 1981); *NRDC v. EPA*, 902 F.2d 962 (D.C. Cir. 1990).

1441) 43. Indeed, EPA argued that when confronted with uncertain and indistinguishable health risks, it may elect to revise NAAQS as a policy matter even without a finding that that action is needed to respond to "significant risk."[2]

It was this interpretation of CAA § 109 that led Non-State CAA Petitioners (CAA Industry Cross-Petitioners here) to argue that, because EPA interprets § 109 of the Act to require no findings that a revised NAAQS will demonstrably improve the public health, "EPA improperly reads § 109 as a standardless delegation of authority." Non-State CAA Pet'rs and Intervenors Reply Br. (D.C. Cir. 97-1441) 17. And it was this assertion by EPA of unbounded public health policy judgment that led the lower court to hold that EPA's interpretation of the Act raised "nondelegation" concerns.

In its petition for certiorari, EPA claimed that the lower court's nondelegation ruling was worthy of certiorari because it "conflicts with this Court's decisions upholding congressional enactments containing far broader grants of authority" than the CAA and "raises questions respecting the constitutionality of a broad range of federal statutes." EPA Pet. 9. In response, CAA Industry Cross-Petitioners observed that the lower court "did *not* question Congress'

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[2] EPA Resp. Br. (D.C. Cir. 97-1441) 42. While EPA argues that the significant risk standard of *Industrial Union Dept., AFL-CIO v. API*, 448 U.S. 607 (1980) is not applicable, the "significant risk" standard has been endorsed by Congress as the threshold for public health regulation under the Clean Air Act. *See* H.R. Rep. 95-294, at 3, 48-49 (1977) *reprinted in* 4 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1977*, at 2470, 2515-16 (Comm. Print 1978) ("1977 Legis. Hist."); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1063 (D.C. Cir. 1995); *Ethyl Corp. v. EPA*, 541 F.2d 1, 16, 31-32 (D.C. Cir. 1976).

authority to legislate in broad terms," "[n]or did the court hold that § 109 is unconstitutional." CAA Ind. Resp. 13.

EPA now agrees that the lower court did not attack the constitutionality of the CAA. EPA therefore re-frames the question as follows:

> The fundamental question here remains whether the nondelegation doctrine provides constitutional limitations on an agency's action.

EPA Resp. 20; *see also* EPA Reply 3-4. The cases cited by CAA Industry Respondents show that it clearly does.[3]

In clarifying the issue on which it seeks certiorari, EPA demonstrates why certiorari, if it is granted, must address the nondelegation issue as presented by CAA Industry Cross-Petitioners. As this Court has explained, there is nothing wrong with broad delegations so long as the agency articulates the principles by which it exercises its authority.

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[3] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't*, 448 U.S. at 646 (plurality opinion) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89, 119 S.Ct. 721, 734-35 (1999); *see generally* CAA Ind. Resp. 14-16 (and accompanying notes).

And the Agency cannot get those principles right unless it follows the guidance Congress gave it in making the delegation. If, as EPA *now* agrees, the question is whether nondelegation constrains the Agency's discretion as it applies the statute, then the issue can be resolved only by examining the terms of Congress' delegation, requiring this Court to address precisely what those terms are.[4]

II. THE LOWER COURT'S HOLDING THAT EPA, IN DEFINING AN INTELLIGIBLE PRINCIPLE, MUST IGNORE FACTORS CRITICAL TO SOUND POLICY JUDGMENT IS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

In attempting to explain why the issue presented by Cross-Petitioners is, in its view, not worthy of certiorari, EPA mischaracterizes it. EPA argues strenuously that the cost or technological feasibility of pollution controls should not be allowed to override protection of public health. *See, e.g.*, EPA Resp. 6, 9. But this is not the issue; no one in this case is arguing that public health protection is not the primary purpose of NAAQS.

Rather, EPA's own science advisers have found that uncertainties in the scientific data related to both particulate matter and ozone are so large that it is not clear that revising the NAAQS will improve public health. *See* CAA Ind.

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[4] For this reason, Massachusetts and New Jersey are incorrect in asserting that the question presented in our conditional Cross-Petition "is not properly presented at this time." *See* Mass. & NJ Resp. 9-10 n.5. For the same reason, while EPA acknowledges that the D.C. Circuit would be required to engage in arbitrary and capricious review on remand, *see* EPA Resp. 19, such review is not possible until EPA defines the legal standard (or "intelligible principle") governing Agency action. *See* CAA Ind. Cross-Pet. 17.

Cross-Pet. 11-12. Against this background, Cross-Petitioners have asked this Court to address whether EPA is constrained to exercise its discretion in a manner that promotes the "public health" generally *and* effectuates the broad congressional purposes of the Act as enunciated in CAA § 101(b), CAA ICP App. 1a. *See* CAA Ind. Cross-Pet. 6, 21-22.

EPA fails to address the real issue here -- that it chose among alternative standards any of which would protect against small and uncertain health risks with no discernible principle for choosing. The only thing EPA can tell us precisely is what principle it did *not* apply, and that is consideration of "costs." Indeed, so devoted is EPA to the "no cost" principle that it prefers to ignore health "costs" (i.e., cancer and cataracts) from increased UVB radiation exposure, hardly a process that promotes the "public" health. *See also* EPA App. 15a, n.4.

EPA asserts that it is precluded from considering factors that one would normally associate with sound risk management judgment[5] by the language of § 109(b), which requires that NAAQS be "requisite to protect the public health."[6] EPA App. 111a. But EPA completely ignores

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[5] *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle* 22-23 (1993).

[6] EPA now apparently agrees with CAA Industry Respondents, however, that the "requisite to protect" language of § 109 requires EPA to a determine that NAAQS revision is "necessary to protect" public health and welfare. *See* EPA Resp. at 9. This is *not* the position EPA took before the lower court. *Compare* Ozone Non-State CAA Pet'rs and Intervenors Pet. (D.C. Cir. 97-1441) 37-38 ("[T]he plain meaning of the word 'requisite' is 'indispensable' or 'necessary,' suggesting that the Administrator must establish a *need* for the revised standard to avoid unacceptable health risk."), *with* EPA Resp. Br. (D.C. Cir. 97-1441) 42 (Petitioners argue that EPA must "demonstrate that the revised standard

other language of § 109 addressed by CAA Industry Cross-Petitioners, directing that EPA allow an "adequate margin of safety" in setting NAAQS and that NAAQS be revised only as the Administrator determines "may be appropriate" in light of § 109(b) and § 108. EPA App. 111a-112a; CAA ICP App. 1a-2a.

In accordance with other decisions addressing language similar to that used in the NAAQS provision, terms such as "adequate" and "appropriate" on their face do not preclude consideration of costs; they must be interpreted.[7] Interpreting them, however, is precisely what EPA (with the lower court's blessing) has refused to do.[8] Moreover, EPA never explains why "the ample margin of safety" language of § 112 does not

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is 'needed to improve demonstrably the overall public health'.... Petitioners' 'test' has no basis in the statute.").

[7] *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*) (*"Vinyl Chloride"*) (interpreting the word "ample"); *cf. West v. Gibson*, 527 U.S. 212, --, 119 S.Ct. 1906, 1910 (1999) (addressing the term "appropriate").

[8] *See, e.g.*, EPA App. 19a (The nature of EPA's risk management authority is resolved under "*Chevron* step one" because the "statute *on its face* does not allow consideration of technological or economic feasibility" (emphasis added).). Curiously, EPA takes a very different position regarding what it characterizes as the "detailed statutory scheme" in CAA Subpart 2, arguing that it must be given discretion to reach a result different from the result Congress reached in Subpart 2. *See* EPA Reply 6. EPA has it backwards – broad delegations must be interpreted; detailed statutory schemes must be implemented. In this regard, CAA Industry Cross-Petitioners also note that, contrary to EPA's claim, *see* EPA Reply 8, their petition for review below challenged the *entire* ozone NAAQS rule, including 40 C.F.R. § 50.9(b).

on its face preclude consideration of costs, yet the "adequate margin of safety" language of § 109 does.[9]

Furthermore, the nature of EPA's authority to make risk management decisions when confronted with a continuum of uncertain and indistinguishable health risks has *not* been addressed by over 20 years of judicial decisions, as EPA suggests. *See* EPA Resp. 7-8. *Lead Industries* addressed, for a threshold pollutant, the issue whether EPA was *required* to consider the cost and technological feasibility of pollution controls in setting NAAQS. The D.C. Circuit, the only court besides this one with authority to review decisions on NAAQS, has expanded upon that decision since that time without pausing to reflect upon its applicability to non-threshold pollutants that call for the exercise of risk management judgment. *See, e.g.*, *NRDC*, 902 F.2d 962.

Nor is the issue resolved in EPA's favor by legislative history. EPA emphasizes that the CAA is a "technology forcing" statute. *See* EPA Resp. 12. But this proves little, because the CAA would still be technology forcing if NAAQS were set to reflect sound risk management principles. Similarly, EPA cites legislative history for the proposition that sources may have to shut down if they cannot meet the NAAQS. *Id.* at 13. But sources would still have to shut down if they could not meet NAAQS that reflect sound risk management principles.

EPA also points to legislative history from the 1977 Amendments to the CAA suggesting that the requirement that EPA obtain the advice of an independent committee on adverse health, welfare, social, economic, and energy effects

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[9] *Compare* EPA Resp. 9 n.6, 17, *with* CAA Ind. Cross-Pet. 9-11 *and* Midwest States Br. 13.

of a NAAQS revision should not be used to reject state implementation plans, and that this information "may be of interest" to Congress in fashioning future legislation. But the requirement of § 109(d) that this information be developed in conjunction with decisions on NAAQS revisions suggests that it *is* to be considered by EPA, and nothing in the statute or the legislative history cited by EPA suggests otherwise.[10]

In light of its understanding that certain pollutants might present no threshold for health effects, Congress in 1977 ultimately rejected an approach suggested by some that NAAQS "are to protect against all known or anticipated effects . . . [since] this no risk philosophy *ignores all social and economic consequences and is impractical.*"[11] EPA does not even address this legislative history, which suggests that

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[10] *See* CAA Ind. Cross-Pet. 5, 22. Indeed, the Government and CBT's citation to Committee Reports, and to provisions of the 1990 Amendments to the Clean Air Act that are separate from § 109, *see* EPA Resp. 15; CBT Resp. 2, in order to explicate the intent of the 1970 and 1977 Congresses in enacting the provision at issue here, stretches the claim that Congress was clear in narrowly prescribing the Agency's discretion in setting NAAQS. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) ("[w]e have often observed... that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (citation omitted).

[11] *See* H.R. Rep. No. 95-294, at 127, *reprinted in* 1977 Legis. Hist., at 2594; CAA Ind. Cross-Pet. 5-6, 9, n.30; *see also* H.R. Rep. No. 95-294, at 110, *reprinted in* 1977 Legis. Hist., at 2577 (recognizing unavailability of thresholds on which to base NAAQS); *id.* at 106, *reprinted in* 1977 Legis. Hist., at 2573 (noting that NAAQS are to reduce, but not eliminate, risk and that the combination of the "Prevention of Significant Deterioration" *and* NAAQS programs would serve to provide for "maximum *feasible* protection") (emphasis added).

risk management authority should be exercised in light of the broader purposes of the Act.[12]

EPA is left with little else except to assert that CAA Industry Cross-Petitioners' view of "wise social policy" differs from that of Congress, EPA Resp. 13, without ever explaining why Congress' statement of policy must be ignored in construing that statute. EPA's view of "wise social policy," of course, precludes consideration of both direct and indirect public health risks associated with NAAQS revision (e.g., risks associated with increased UVB radiation exposure and disruption to the congressional ozone reduction program). But Congress wrote § 109 to focus on the "public" health, and these considerations are clearly relevant to the public health.

Moreover, Congress explained that the purpose of the Act is to promote health *and* welfare *and* the productive capacity of the population. CAA § 101(b)(1), CAA ICP App. 1a. If anything, this statutory language and legislative history indicate that Congress knew that a profligate commitment of money and resources to address one set of uncertain risks could increase, or limit the means to cope with, other more serious risks.[13]

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[12] ALA's extended discussion of legislative history, *see* ALA Resp. 14-24, is similarly off the mark because it does not address congressional intent regarding the exercise of risk management judgment for non-threshold pollutants.

[13] In this regard, EPA does not dispute that its estimate of the costs of attaining the ozone standard outweighs the benefits, and that the costs of attaining the PM standards are an extraordinarily-high $37 billion annually. And while EPA suggests that it has "historically *over*estimated the actual cost" of NAAQS implementation, we know in this case that the Council of Economic Advisers concluded that EPA may well have substantially *under*estimated those costs. *See* Memorandum from Alicia

CONCLUSION

The issue of EPA's discretion to consider "costs" when confronted with a continuum of uncertain health risks is one of great importance. Because EPA's NAAQS decisions have such extraordinary impacts on society and the national economy, and because this Court can evaluate whether the nondelegation doctrine constrains the Agency's action here only by addressing the nature and scope of EPA's authority to define "intelligible principles" on remand, CAA Industry Cross-Petitioners request that the Conditional Cross-Petition in No. 99-1431 be granted.

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Munnell to Art Fraas, OMB (Dec. 13, 1996) (EPA Docket No. A-95-58, Item IV-H-1).

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